CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918

No. [redacted] 178

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

vs.

J. F. HASTY & SONS, MOUNT OLIVE STAVE COMPANY, PULASKI COOPERAGE COMPANY, AND THE HENRY WRAPE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED SEPTEMBER 28, 1918.

(27,308)

(27,308)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 553.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

vs.

J. F. HASTY & SONS, MOUNT OLIVE STAVE COMPANY, PULASKI COOPERAGE COMPANY, AND THE HENRY WRAPE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1920.

a *Transcript of Record on Appeal from the District Court of the United States for the Western Division of the Eastern District of Arkansas.*

In the Case of

St. Louis, Iron Mountain & Southern Railway Company, Appellants,

vs.

George W. Bellamy et al., Constituting the Railroad Commission of the State of Arkansas, Appellees.

On the Interventions of J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company, and the Henry Wrape Company.

John M. Moore and George A. McConnell, of Little Rock, Arkansas, for Appellants.

George B. Rose, W. E. Hemingway, D. H. Cantrell and J. F. Loughborough, of Little Rock, Arkansas, for Interveners.

1 In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

Be it remembered, That on the third day of May, A. D. 1919, there was filed in the office of the Clerk of the District Court of the United States for the Eastern District of Arkansas, Western Division, the Mandate of the Supreme Court of the United States in the cases of St. Louis Southwestern Railway Company vs. William F. McKnight et al., constituting the Railroad Commission of the State of Arkansas, No. 1636 and St. Louis, Iron Mountain and Southern Railway Company vs. William F. McKnight et al., constituting the Railroad Commission of Arkansas, No. 1637, which Mandate is in words and figures as follows, to-wit:

United States of America, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Eastern District of Arkansas, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Arkansas, before you, in the causes between St. Louis, Southwestern Railway Company, and William F. McKnight et al., constituting the Railroad Commission of the State of Arkansas, No. 1636, and St. Louis, Iron Mountain and Southern Railway Com-

pany, and William F. McKnight et al., constituting the Rail-
2 road Commission of the State of Arkansas, No. 1637, wherein
the decree of the District Court, entered in said causes on the 14th day of June, A. D. 1916, on the interventions of Arkadelphia Milling Company; Joseph F. Hasty, Eliphalet F. Hasty and William C. Hasty, composing the partnership of J. F. Hasty & Sons; and The Southern Cotton Oil Company, is in the following words, viz:

"Now on this day this cause came on to be heard and was argued by counsel, and on consideration thereof, it was ordered, adjudged and decreed as follows:

That the exceptions of the St. Louis, Iron Mountain and Southern Railway Company to the claims of the Southern Cotton Oil Company be overruled, and that the Southern Cotton Oil Company do have and recover of and from the St. Louis, Iron Mountain and Southern Railway Company and the United States Fidelity and Guaranty Company, the surety on the injunction bond herein, the sum of forty-two thousand, four hundred thirteen dollars and sixteen cents ($42,413.16).

The exceptions of the St. Louis Southwestern Railway Company to the claim of the Southern Cotton Oil Company be overruled, and that the Southern Cotton Oil Company do have and recover of and from the St. Louis Southwestern Railway Company and the United States Fidelity and Guaranty Company, the surety on the injunction bond herein, the sum of six thousand, five hundred and fifty-two dollars and three cents (6,552.03).

That said judgments bear interest from the date hereof at the rate of six per cent per annum.

That the exceptions of the St. Louis Iron Mountain and Southern Railway Company, and of the St. Louis Southewestern Railway Company, respectively, to the claim of J. F. Hasty & Sons, against
3 each of said companies, based on the ground that said claims
were movements in interstate commerce, and that the rates on which said claims were based were discriminatory, be and the same is hereby sustained.

That the exceptions of the St. Louis, Iron Mountain and Southern Railway Company to the claims of the Arkadelphia Milling Company based on the ground that the rates on which said claims were based were discriminatory, be and the same is hereby sustained. An- inasmuch as the aforesaid grounds of exceptions dispose of said claims of the said J. F. Hasty & Sons and the Arkadelphia Milling Company, the Court does not consider or pass upon any other exceptions to the allowance of said claims by the master filed by either the complainants or said claimants, or make any findings as to them.

It is therefore ordered, adjudged and decreed that the aforesaid claims of J. F. Hasty & Sons and the Arkadelphia Milling Company and each of them be disallowed.

(Signed) JACOB TRIEBER,
Judge.

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of separate appeals taken by the Arkadelphia Milling Company, Joseph F. Hasty et al., composing the partnership of J. F. Hasty & Sons, St. Louis, Iron Mountain and Southern Railway Company, et al., and St. Louis Southwestern Railway Company, et al., respectively, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eighteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record on separate appeals, and was argued by counsel:

4 On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in these causes as to the appellants The Arkadelphia Milling Company and J. F. Hasty & Sons, be, and the same is hereby reversed with costs, and that the said Arkadelphia Milling Company and J. F. Hasty & Sons recover against the St. Louis Southwestern Railway Company and St. Louis, Iron Mountain and Southern Railway Company one hundred and six dollars for their costs herein expended and have execution therefor, and that the decree of the said District Court as to the appellants The Railway Companies be modified as indicated in the opinion of this Court, and, as so modified, be and the same is hereby affirmed with costs, and that the said The Southern Cotton Oil Company recover against the said St. Louis, Iron Mountain and Southern Railway Company and St. Louis Southwestern Railway Company twenty dollars for its costs herein expended and have execution therefor.

And it is further ordered that these causes be, and the same are hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

March 3, 1919.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States ought to be had, the said appeals notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of April in the year of our Lord one thousand nine hundred and nineteen.

5 *Costs of Arkadelphia Milling Co. and J. F. Hasty & Sons.*

Clerk	$56.75
½ Printing Record	29.25
Attorney	20.00
	$106.00

Costs of Southern Cotton Oil Co.

Attorney $20.00

(Signed) JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Endorsed: Filed May 3, 1919. Sid B. Redding Clerk.

6 UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

Be it remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the Seventh day of April, Anno Domini, One Thousand, Nine Hundred and Nineteen, at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Jacob Trieber, Judge presiding and holding said Court, the following proceedings were had, to-wit: on June 3rd, 1919:

No. 1637.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY

vs.

GEORGE W. BELLAMY et al., as Railroad Commission for the State of Arkansas.

Decree on the Interventions of J. F. Hasty & Sons et al.

On this day came on for hearing the interventions of the parties hereinafter noted, and it appearing that the only exception to any of said interventions now urged by complainant is the exception that certain parts of the shipments of said interveners consisted of heading and were not entitled to rough material rates, and the Court being well and sufficiently advised in the premises, doth overrule said exception.

It is, therefore, ordered, adjudged, and decreed that the following named interveners do have and recover of and from the complainant St. Louis, Iron Mountain and Southern Railway Company and the United States Fidelity and Guaranty Company on their judgments on their respective claims in Series A and B, and judgment against the complainant St. Louis, Iron Mountain and Southern Railway Company on their respective claims in Series C, the several amounts hereinafter noted in the several Series:

7 Intervener J. F. Hasty & Sons in Series A, Eighteen Hundred and Seventy-four and 21/100 Dollars; in Series B, Ninety-one Hundred and Twenty-two and 73/100 Dollars, and in Series C, Thirteen Thousand, One Hundred and Forty-seven and 95/100 Dollars.

Intervener Mount Olive Stave Company in Series A, Two Hundred and Thirty-eight and 40/100 Dollars; in Series B Twelve Hundred and Twenty-nine and 98/100 Dollars, and in Series C Thirty-three Hundred and Five and 45/100 Dollars.

Intervener Henry Wrape Company in Series A, One Hundred and Fifteen and 15/100 Dollars; in Series B Twenty-four Hundred and Thirty-nine and 76/100 Dollars, and in Series C Four Thousand Nine Hundred and Twenty-two and 60/100 Dollars.

Intervener Pulaski Cooperage Company in Series B, One Hundred and Twenty-nine and 51/100 Dollars, and in Series C Eleven Hundred and Six and 14/100 Dollars.

Each of said judgments shall bear interest at the rate of six per cent per annum from this date until paid.

The respective motions of each of said interveners that the amount of their judgments in Series C be declared a lien on the railroad property of complainant are overruled, and to the action of the Court in overruling each of said interveners at the time saved its exceptions.

It is further ordered that each intervener recover all their costs herein expended in Series A and B against complainant and the United States Fidelity and Guaranty Company and in Series C against complainant alone, and intervener J. F. Hasty & Sons recover against complainant and the United States Fidelity and Guaranty Company the further sum of Fifty-two Dollars for their costs in the
8 Supreme Court.

(Signed) JACOB TRIEBER,
Judge.

9 And on August 30th, 1919, the following proceedings were had, to-wit:

St. Louis, Iron Mountain and Southern Railway Company et al.

vs.

George W. Bellamy et al., as Railroad Commission for the State of Arkansas.

Come the complainants, St. Louis, Iron Mountain and Southern Railway Company and United States Fidelity and Guaranty Company, and present to the Court the statement of the case which is examined by the Judge of this Court, approved and ordered filed as a part of the record in this case; and said St. Louis, Iron Mountain and Southern Railway Company and the United States Fidelity and Guaranty Company also file their assignment of errors and petition for appeal, which appeal is allowed returnable in thirty days, upon the execution of a bond in the sum of $500.00, conditioned as required by law; and said St. Louis, Iron Mountain and Southern Railway Company and the United States Fidelity and Guaranty Company file herein their bond with E. J. Bodman as surety, which bond is approved by the Clerk of this Court; and said complainants also file their præcipe for the transcript on said appeal.

Which Statement of the Case is as follows:

10 In the United States District Court for the Western Division of the Eastern District of Arkansas.

St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,

vs.

George W. Bellamy et al., as Railroad Commission for the State of Arkansas, Defendants.

On the Claims of J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company, and The Henry Wrape Company.

As the questions presented by the appeals herein can be determined by the appellate court without an examination of all the pleadings and evidence, the parties hereto having obtained the approval of the Court, do prepare and sign the following statement of the case.

The appeals of the complainant herein are from the decision of the District Court for the Western Division of the Eastern District of Arkansas, allowing the claims of the interveners herein for refund on shipments of heading from the woods into the milling point, which said shipments moved from one point to another point within the State of Arkansas. The basis of the refund or allowance by the Court was the difference between the alleged rough material rate on heading, which rate is alleged to be namd in Item 79 of Distance Tariff Number Three, and the rate charged on the movement of said heading during the pendency of the injunction as hereinafter explained.

On July 18th, 1908, the complainant, St. Louis, Iron
11 Mountain and Southern Railway Company, filed, in this
Court, its bill of complaint against George W. Bellamy, William F. McKnight and J. Sam Rowland, as Railroad Commissioners of the State of Arkansas, wherein was alleged the valid organization of the Railroad Commission of the State of Arkansas, and the parties named as defendants in said bill were all the members of that Commission, and that the said Commission was authorized to fix rates to be charged by railroads in the State of Arkansas for the transportation of freight and passengers in that State. It was further alleged that on June 4th, 1908, said defendants, acting in their official capacity as Railroad Commissioners of the State of Arkansas, adopted Standard Freight Distance Tariff No. 3, applying on all classes and commodities of freight on all railroads operated in the State of Arkansas, and ordered the same to take effect on June 15th 1908; and it was alleged that all of said rates were unreasonable, unjust, discriminative, confiscatory and void; and said bill contained statements tending to show that such rates did not yield an adequate return to the plaintiff for the services rendered in the transportation of such freight; and it was further alleged that the rate for the

transportation of passengers fixed at two cents per mile by Act of the Legislature of Arkansas on the 9th day of February, 1907, was confiscatory and void as to the plaintiff; and it was alleged that the operation of said freight tariff would deny complainant the equal protection of the law and take its property without due process of law, and that complainant was without remedy at law and could only obtain relief in a court of equity. It was prayed that said Distance Tariff No. 3 be held void, and that its operation be permanently restrained; and the same prayer was made as to the Act of
12 the Legislature fixing the passenger rates. A temporary restraining order was also asked for. On July 25th, 1908, the defendants filed their answer to each of the bills of complaint filed herein, denying in detail the statements in the complaint tending to show that the rates set forth in Standard Freight Distance Tariff No. 3 were unjust, unreasonable, discriminative, confiscatory and void, and prayed that the bill of complaint be dismissed for want of equity.

On September 3rd, 1908, the Judge of the Circuit Court of Appeals for the Eight- Circuit granted a temporary injunction restraining the Railroad Commission of Arkansas from continuing in effect the rates named in Standard Freight Distance Tariff No. 3, said order containing a provision that the complainant execute a bond to the United States of America in the sum of Two Hundred Thousand Dollars ($200,000.00) conditioned that complainant should keep a correct account showing, as respects every carriage of passengers and freight, the difference between the tariff actually charged and that which would have been charged had the rates inhibited been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected as far as may be practicable, which record shall be made and kept subject to the further order of this Court, and further conditioned that if it should eventually be declared that so much of this order as inhibits the enforcement of existing rates should not have been made, that said complainant shall, within a reasonable time, to be fixed by the Court refund in every instance to the party entitled thereto the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages.

The injunction took effect on the filing of the bond, Sep-
13 tember 12th, 1908.

On June 23rd, 1909, the Judge of the District Court entered an order requiring the St. Louis, Iron Mountain and Southern Railway Company to execute an additional bond in the sum of Eight Hundred Thousand Dollars, signed by itself, without additional sureties, said bond being conditioned the same as was the first bond filed and hereinbefore described, and said bond was filed in accordance with the order.

Much testimony was taken by the complainant and the defendants to sustain their respective contentions; and on May 11th, 1911, the cause came on for final hearing, and the following decree was rendered by the Court in both cases:

"Now on this day comes the complainant, by its solicitors, Moore, Smith & Moore, Esqs., and also come the defendants by their solicitors, Joseph M. Hill and James H. Harrod, Esqs., and thereupon, said cause having been argued upon the evidence and stipulations on file and of record in said cause, and having been taken under advisement at a former term of this Court, and the Court being well and sufficiently advised in the premises, it is accordingly ordered and decreed that the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, as Railroad Commissioners of the State of Arkansas, and Henry Leigh and George McLean, and each of them, their agents, employees, and successors, as well as all other persons, patrons of complainant, either in the shipment of freight, or as passengers between stations on complainant's railroad in the State of Arkansas, are hereby perpetually enjoined from enforcing or attempting directly or indirectly by any suit or in any manner whatsoever to enforce against the complainant, its officers, agents, employees, servants, any of the provisions of Standard Freight Distance Tariff No. 3, and amendments thereto adopted prior
14 to the institution of this action, prescribing the rate or rates
for transportation of classes and commodities or any provisions of said tariff whereby any of said rates shall be continued in force, or from enforcing or attempting directly or indirectly, by any suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, or servants, any of the provisions of any Act of the General Assembly of the State of Arkansas, entitled: "An Act to Amend Section 6611 of Kirby's Digest of the Statutes of Arkansas, by fixing Passenger Rates in this State and for Other Purposes," approved February 9th, 1907, or to enforce the provisions of any other Act or Acts of the Legislature of said State providing penalties for non-compliance by complainant with the provisions and requirements of Standard Freight Distance Tariff No. 3, and Amendments thereto as aforesaid, or the aforesaid Act of the Legislature of the State of Arkansas fixing passenger rates in said State.

"It is further ordered that the costs incurred by the complainant and defendants respectively, in procuring the attendance of witnesses before the Master and the payment of fees of stenographers in the recording of said testimony be borne by the complainant and the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, and that neither party recover from the other therefor: that all remaining costs, including master's fees, the complainant pay one fourth and the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, Railroad Commissioners as aforesaid, pay one-half, the other one-fourth to be paid by the complainant in case No. 1636, the payment of said costs to be recovered by execution to be issued by the Clerk of this Court
15 upon the application of either party in interest.

"It is further ordered that the bond for injunction filed by the complainant herein be released and the sureties thereon discharged from liability.

"And the Court reserves and retains unto itself jurisdiction of the subject matter of this suit and of all parties thereto to the end that

such other and further orders and decrees may be made herein as may become necessary herein by reason of any changed conditions as to the fact-, equities or rights that may hereafter take place or arise.

"(Signed) JACOB TRIEBER, *Judge*."

From this decree appeals were taken by the defendants to the Supreme Court of the United States; and on a hearing by that Court the decree was reversed and the cause remanded, with directions to the District Court to dismiss the bill of complaint without prejudice, and for such other proceedings as equity and justice demanded. The decision of the Supreme Court on those appeals is reported under the style of St. Louis, Iron Mountain and Southern Railway Company vs. Allen, et al., 230 U. S. 553.

The mandate from the Supreme Court of the United States was filed in the District Court on June 18th, 1913, and thereupon the said District Court entered a decree in pursuance of said mandate dismissing the complaint without prejudice and containing the following provisions for further proceedings in the cause:

"And, thereupon, the Court, of its own motion, and against the objection of the complainant, refers, under Rule 15 of this Court, the matter of damages alleged to have been sustained by the defendants, the Railroad Commissioners of the State of Ar-
16 kansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a Special Master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said Commissioners are not acting for themselves but for the benefit of all persons, shippers, consignees and passengers, who have sustained any damages by reason of the granting of said injunctions, the Master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books, papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him.

"It it further ordered by the Court that any books, reports or transcripts thereof, called for by said Master shall be furnished by the plaintiff herein as speedily as possible. And the Master is further directed to give notice by publication in seven newspapers published in the State of Arkansas, one published in each of the following cities of the State, to-wit: Little Rock, Fort Smith, Pine Bluff, Texarkana, Camden, Jonesboro and Helena, and also in such other papers as the Master may deem proper, to the effect that all persons having any claims against the complainant by reason of the granting of the injunction herein, shall present the same to him on or before the 1st day of November, 1913, by filing with him the evidence of their claims, or such other proof as they may possess. That said notice shall be published in said newspapers once a week for four weeks in all of said papers.

"The Master will report separately all claims which arose under the first temporary injunction granted by the Honorable
17 Willis Van Devanter; next, of all claims which arose under the bond executed in pursuance of the order made by the Honorable Jacob Trieber, District Judge, in this case, and next report all claims which arose after the final decree making the injunction permanent was rendered.

"The Master is hereby authorized to employ such clerical assistance as in his judgment may be necessary for the purpose of aiding him in the performance of his duties.

"The complainant is directed to instruct its agents to furnish the shippers and consignees whose bills have been lost, mislaid or destroyed, or are in the possession of the complainant, such information as appears from their records or is in their possession to enable the parties to prepare their claims.

"The Master will make a report of his findings to the Court, together with any evidence that may have been taken.

"The Court reserves the power to make any additional order or instructions for the guidance of the Master in this cause."

Each of the interveners in the present appeals filed thier respective claims on or before the first day of November, 1913, in said cause as directed in the said decree.

On the 2nd. day of December, 1914, the Master appointed herein filed his report showing in detail the claims filed, allowed and disallowed, and showing in his report the claims filed, allowed and disallowed by him in three separate periods, as directed by the Court in the order appointing him, one being from the time of the issuance of the interlocutory injunction herein on September 3rd, 1908, to the time that the additional bond was filed on July 5th,
1909. This was termed in the Master's Report "Series A."
18 One, the period between July 5th, 1909, and May 11th, 1911, the time of the final decree herein by the District Court, and this was termed "Series B." Another, the period between May 11th, 1911, and the date the decree was entered by the District Court putting in force the Mandate of the Supreme Court of the United States, towit: July 11th, 1913, and this was termed "Series C."

Each of interveners shipped out over complainant's line the requisite percentage of finished heading required by item 79 of the tariff to entitle them to the rough material rate if that item in the tariff covers rough heading.

The claims of the interveners herein were duly allowed by the Master, separately, in the several Series A, B and C, and the amount of each of such allowances in the several series with six per cent interest to the date of the respective judgments are the amounts recited in the respective judgments appearing in this record.

After the interveners filed their claims before the Master the complainant at the proper time filed objections to the allowance of each and all of said claims, objecting to the allowance thereof on the ground that said claims were based on inbound shipments of rough heading, the rates charged thereon being the rates provided by the

complainant's tariff, issued during the pendency of the injunction, which tariff carried rough material rates on rough heading. Complainant's said objection was that: The basis of said claims is the difference between the rates actually paid and the rates covered by Item 79 of Standard Freight Distance Tariff No. 3 on bolts. There is no rate on inbound rough heading provided by Distance Tariff No. 3, Item 79, but the same is covered by Item 41 of said
19 Standard Distance Tariff No. 3 and since the rates provided by Item 41 are higher than the rates actually charged, the complainant avers that there is no basis for refund and that the claims should be disallowed." This objection was overruled by the Master and each of said claims allowed. After the Master filed his report in the District Court, the complainant, within the proper time, filed the following exception, among other, to the findings and report of the Master in allowing each and all of the claims involved herein:

"That said claims and each of them are based on inbound shipments of rough heading, the rates charged thereon being the rates provided by the complainant's tariffs issued during the pendency of the injunction, which tariffs carried rough material rates on rough heading. The basis of these claims is the difference between the rate actually paid and the rates carried in Item 79 of Standard Freight Distance Tariff No. 3 on bolts. There is no rate on inbound rough heading provided by Distance Tariff No. 3, Item 79, but the same is covered by Item 41 of said Distance Tariff No. 3; and since the rates provided by Item 41 are higher than the rates actually charged, the complainant avers that there is no basis for refund and the Master erred in allowing said claims and each of them."

This was the only exception remaining undisposed of at the time.

Item 40 of said Distance Tariff No. 3, prescribing the local or flat rate on lumber, stave bolts, etc., is as follows:

"Item #40. Lumber rates will apply on lumber, except Walnut, Butternut, Cherry and Woods of Value; also on the following articles in straight or mixed carloads:

20 Base Boards.

Bed Slats.

Blocks, Corner and Base.
Blocks, Head and Plinth.
Box Lumber or Shooks, including Scarfed Berry Box Material, in bundles or racks.
Carpenter's Mouldings.

Casing.

Combined Lath and Sheeting.
Curtain Poles, in the rough, cut to dimensions and turned.

Cross Arms.
Fence Posts.
Guttering, rough.
Lath, Pine.
Telegraph and Telephone Poles.

Walnut Logs, not squared.
Window Stools, Aprons and Hoods.

Lumber, including ceiling, Flooring (except Wood Carpet).
Wainscoting, Match Blocks and Circus Seats (not upholstered nor with backs).

Paving Blocks.

Piles.
Plow Handles, not further finished than planed and hand holds shellac-ed.
Rough Sawed Hewn Shapes for Agricultural Impliments and Vehicles not further finished than planed.

Sawed and Bent Shapes for Agricultural Impliments and Vehicles not further finished than planed.

Shingles.
Spools (for barbed wire). K. D.
Stave Bolts.
Tank Material, sawed in shape, racked up.
Well Tubing.

Item 40.

	Distance—miles.	Lumber, laths and shingles.
	5 and under	3
	10 and over 5	3
	15 and over 10	3
	20 and over 15	3
	25 and over 20	3
	30 and over 25	4
	35 and over 30	4
21	40 and over 35	4
	45 and over 40	4
	50 and over 45	4
	55 and over 50	4½
	60 and over 55	4½
	65 and over 60	4½
	70 and over 65	4½
	75 and over 70	4½
	80 and over 75	5
	85 and over 80	5
	90 and over 85	5
	95 and over 90	5
	100 and over 95	5
	110 and over 100	6
	120 and over 110	6
	130 and over 120	6
	140 and over 130	6
	150 and over 140	6
	160 and over 150	7
	170 and over 160	7
	180 and over 170	7
	190 and over 180	7
	200 and over 190	7
	210 and over 200	8
	220 and over 210	8
	230 and over 220	8
	240 and over 230	8
	250 and over 240	9
	260 and over 250	9
	270 and over 260	10
	280 and over 270	10
	290 and over 280	12
	300 and over 290	12

22 Articles taking higher than lumber rates:

Walnut, Butternut, and Cherry Lumber and Walnut Logs (Squared), car loads, 3 cents above Lumber rates. Mahogany, Holly, and woods of value, see Classification.

All other woods, lumber rates.

The following articles, when loaded in straight or mixed car loads, will take 3 cents 100 pounds above the Lumber Rates, subject to the minimum weights governing shipments of Lumber. When loaded

with Articles taking Lumber Rates, they will take 5 cents over the Lumber Rates on the actual weight of such articles, provided they are specified on the shipping tickets; if not so specified, the regular less car load rating will apply; the total charges on the entire car load, however, not to exceed the charges on a straight or mixed car load or articles taking three (3) cents per 100 pounds above the Lumber Rates:

Angle Beads.
Astragals.
Balusters.
Balustrade Work.
*Base Boards.
Blinds, Inside and Outside.
*Blocks, Corner and Base.
*Blocks, Head and Plinth.
Cresting.
Door Jambs.
Doors, Panel.
Doors, Screen.
Doors, glazed with common window glass, or unglazed (if glazed, released).
Gable Ornaments.
Grill Work.
Panel Jambs.
Panel Wainscoting and Ceiling.
Pantry Fittings.
Pilasters.
Porch Newels.
Porch and Piazza Columns.
Porch Railing.
Portiers Work.
*Carpenter's Mouldings.
*Casings.
Closet Fittings.
Closet Seats.
Closet Tanks.
Corner Beads.
Cornice Brackets.
Rosettes.
Sash, glazed, with common window glass, or unglazed if glazed, released.
Scroll Work.
Shelves.
Shutters, Inside and Outside.
Spindles.
Stair Work, Newels, Risers, Treads, Railings, Balusters, and Post Ornaments, K. D. and taken apart.
Store Fronts.
Turned Work, entering into the construction of buildings.
*Wainscoting.
Wash Tub Covers.
Window, Door, Blind and Screen Frames, set up or K. D.
Windows, Screen.
*Window, Stools, Aprons and Hoods.
Porch Work.

The basis for rates on Inside Finish Material will not apply on articles named when polished or varnished.

23 NOTE.—The foregoing rates will not apply on the articles named when manufactured from Mahogany, Rosewood, Lignum Vitæ, or other valuable woods.

*Applies when manufactured from woods other than those enumerated above as taking Lumber Rates.

The following articles, when loaded in straight or mixed car loads, will take 3 cents per 100 pounds above the Lumber Rates:

Ax Handles, turned, not further finished.
Handle Butts, turned, not otherwise finished.
Last, in rough.
Sleigh wood, turned, not otherwise finished.
Shapes for Vehicles, dressed.
Shapes for Agricultural Impliments, dressed.
Wagon Bows.

NOTE.—The less car load rates on Wooden Cross Arms for telephone, telegraph and electric light poles will be 300 per cent of the car load Lumber Rate.

	Car loads, minimum weight.
Shingles, Car Load	24,000

All other articles taking lumber rates and higher minimum weight, car load, shall be 30,000 pounds, except when car is loaded to full visible capacity, when actual weight shall govern, subject to a minimum weight of 24,000 pounds.

Piling, Logs, Telegraph and Telephone Poles, and other Long Timbers requiring more than one car, shall be charged for at a minimum weight of 20,000 pounds for every car used.

"Dowell Pins", straight car load, 5 cents per cwt. higher than Lumber Rates. (Order 360).

The rate on Portable Houses, K. D., car load will be made 3 cents higher than the car load rates on Lumber. (Order 301.)

Brick, not exceedings 2,000 in number; Lime, not exceeding 3 barrels, and sand not exceeding 2 yards, may be included in each car of Lumber, or Lumber and articles included in the Lumber mixture, and such brick, lime and sand so included shall be charged for at the car load lumber rate. (Order 343.)

Item 11 of said Distance Tariff No. 3 is as follows:

Item #41. Staves, Headings and Hoops.

	Car loads, minimum weight.
Straight or Mixed Car Loads	30,000

Item 41.

Distance, miles.	Staves and headings.
5 and under	3
10 and over 5	3
15 and over 10	3
20 and over 15	4
25 and over 20	4
30 and over 25	4½
35 and over 30	4½
40 and over 35	4½
45 and over 40	4½
50 and over 45	4½
55 and over 50	5
60 and over 55	5
65 and over 60	5
70 and over 65	5
75 and over 70	5
80 and over 75	6
85 and over 80	6
90 and over 85	6
95 and over 90	6
100 and over 95	6
110 and over 100	7
120 and over 110	7
130 and over 120	7
140 and over 130	7
150 and over 140	7
160 and over 150	8
170 and over 160	8
180 and over 170	8
190 and over 180	8
200 and over 190	8
210 and over 200	9
220 and over 210	9
230 and over 220	9
240 and over 230	10
250 and over 240	10
260 and over 250	10
270 and over 260	11
280 and over 270	11
290 and over 280	13
300 and over 290	13

Item 79 of said Distance Tariff No. 3 is as follows:

"Item 79. Rough Material Rates.

(a) Rough Material Rates applicable on Rough Lumber, Staves, Flitches, Bolts, and Logs, car loads, between all points in Arkansas, minimum weight. In cars of 40,000 pounds or greater marked capacity, the minimum weight will be 40,000 lbs. In cars of less than 40,000 pounds marked capacity, the minimum weight will be the marked capacity of the car.

Distance	Rate in cents per hundred pounds.
1 to 50 miles, inclusive	2 Cents.
51 to 100 " "	2½ "
101 to 150 " "	3½ "
151 to 250 " "	5 "
251 miles and over	8 "

(b) The above named rates are conditional upon the manufactured product being reshipped over the same line bringing in the rough material, and may be only used subject to the following conditions: The proportion of the tonnage of outbound manufactured product to the tonnage of in-bound rough material shall not be less than the following:

26 3—845.

Finished Lumber, 60 per cent of weight of rough lumber.
Finished Staves, 40 per cent of weight of rough staves.
Spoke Bolts, sawed in shape, 40 per cent of weight of rough bolts.
Rough Spokes, 20 per cent of weight of spoke bolts.
Handles, 20 per cent of weight of handle bolts.
Hoops, 15 per cent of weight of flitches.
Hubs, 16 2/3 per cent of weight of hub bolts.
Staves and Heading, 30 per cent of weight of bolts.
Boat Oars, 20 per cent of weight of rough material.
Furniture, 60 per cent of weight of rough material.
Lumber 33 1/3 per cent of weight of logs.
All other finished products, 60 per cent of weight of rough material.

(c) The rates above named are intended to be used as rough material rates only and carriers will be allowed by the commission to require consignees desiring to avail themselves of the benefit of same to enter into a suitable contract with reference to the re-shipment of the specified percentage of finished product; Provided, the terms of said contract must be satisfactory to and approved by the Commission; Provided, further, that in no case shall the contract provide a higher rate on in-bound shipments than outlined in the above table.

3—553

(*d*) The rates provided in this order do not include switching charges at point of shipment or at destination. All such charges will be assessed and collected in addition to the regular freight charges.

(*e*) The rates provided in this order shall not apply to joint shipments. (Order 312.)

(*f*) Effective November 1, 1907.—"The proportion of the tonnage of outbound manufactured product to the tonnage of in-bound rough material shall not be less than the following:

Shuttle Blocks, 30 per cent weight of rough material. (Order 352.)"

That the aforesaid claimants shipped over the line of railroad that brought in the rough material, the requisite percentages of manufactured product named in said Item #59 of said Tariff, in the usual course of business as hereinafter described.

That said Tariff also carried other schedules of rates applicable to the movement of the same commodities as those covered by the above claims where there was to be no re-shipment of the inbound rough material in its finished state from the mill, said rates
27 being known as the flat or local rates and are covered by Items 40 and 41, which are set out above.

The claims of the interveners coming on for hearing in said District Court, upon the exception above set out, on June 3rd, 1919, and the Court overruled said exception and allowed said claims in the following amounts, to wit:

J. F. Hasty & Sons.

Series	A	$1,874.21
"	B	9,122.73
"	C	13,147.95

Mount Olive Stave Company.

Series	A	$258.40
"	B	1,229.98
"	C	3,305.45

The Henry Wrape Company.

Series	A	$115.15
"	B	2,439.67
"	C	1,922.60

Pulaski Cooperage Company.

Series	A	None.
"	B	$129.51
"	C	1,106.11

The said claims of the interveners herein are based on alleged overcharges on heading and also on rough material other than head-

ing and the above amounts represent the total of each intervener's claims for overcharges on heading and rough material other than headings.

The amount of each of said intervener's claims which complainant contends are based on alleged overcharges on shipments of headings is as follows:

J. F. HASTY & SONS.

28	Series A	$1,153.36
	" B	4,907.02
	" C	9,175.45
		$15,235.83

Mount Olive Stave Company.

Series A	None
" B	None
" C	$13,348.72

Pulaski Cooperage Company.

Series A	None
" B	$353.06
" C	778.97
	$1,132.03

The Henry Wrape Company.

Series A.	None
" B.	$48.01
" C.	232.55
	$280.56

The question involved in this appeal being whether Item 79 of Distance Tariff No. 3 provided or contained a rough material rate on heading and the question being identical as to the claims of all of the interveners, in order to save costs, expenses and inconvenience to the appellate court as well as the parties hereto, the parties agreed, with the approval of the Court, that the hearings and the appeals therein from the judgments and decrees of the Court, allowing said heading claims should be consolidated and the appeals presented under one record and proceeding.

The rates carried in Item 41 of Distance Tariff No. 3 on headings are higher than the rates actually paid by the interveners herein on the shipments of headings involved herein. Therefore, if it
29 is held that Item 79 did not apply to headings, then none of the interveners herein would be entitled to any refund on the headings claims herein involved.

At the proper time and in accordance with the rules of the Court, depositions were taken by the complainant and interveners herein, the complainant seeking to defeat said claims and the interveners to

sustain them. The following testimony was taken in the case before the Master and submitted to him and submitted to the Court on the hearing of the Master's Report and the exceptions thereto, the Master expressly finding that rough heading was covered as rough material in Item 79 of the Tariff, and the District Court expressly sustaining that finding.

This disposing of the exception, there was no finding by the Master or the Court whether the claims were in fact based on shipments of heading, or if some of them were, the amount thereof. If the Supreme Court should hold that shipments of headings were not entitled to rough material rates it would remain for the District Court to ascertain the amount of the shipments of heading involved.

Complainant's Evidence.

E. H. CALEF, General Freight Agent of the Complainant testified, in substance, as follows:

I have been employed by the complainant for thirty-one years, more than twenty years of which I have been employed in departments where I was required to familiarize myself with tariffs and rates. My departments makes rates, rules and regulations of the tariffs. We not only make them but we interpret them. Our department is considered the authority on rates and tariffs. There is no rate provided on rough heading in Item 79 of Distance Tariff No. 3. Part of the time during the injunction period the Railway Company had tariffs carrying rough material rate on rough heading, part of the time they did not, the injunction period being from September 3rd, 1908, to July 18th, 1913. The first time rough heading was included in the rough material tariff was in March, 1910. The Railway Company issued another tariff covering rough material, taking effect February 6th, 1911, and in that tariff provided inbound rates on rough heading and specified the percentages that were required to be reshipped out from the milling point. First express mention of rough heading as a rough material in tariff was in one effective on state traffic March 12th, 1910, and effective on interstate traffic April 9th, 1910. This expressly designated rough heading as a rough material, but had no provision showing the percentage of finished products to be shipped out, but it provides for rough heading inbound and there is provision in here for staves and heading to take thirty per cent of the weight of bolts. Tariff 3975-B, was effective on state traffic on February 6th, 1911, and in that we had finished heading forty per cent of the weight of rough heading. The Court tariff, being the one issued by the District Court in this case effective June 1st, 1909, contains the same designation of rough material in a finished product out as shown in Item 79 of Distance Tariff Number 3. It is exceedingly difficult to make an intelligent explanation of these rough material issues because they were issued and re-issued; a long procession of them in quick succession; and to make an intelligent comparison and get right down to rock bottom on every item in that is

a very difficult matter and one requiring long study and preparation. The statements I am making now are based absolutely
31 on the tariffs in effect as I read them.

I do not think the occasion for specifically mentioning rough heading in the tariffs arose during the pendency of the injunction and before the decision of the Supreme Court there were hearings before the Arkansas Commission, in which the rough material users and the carriers were represented and various phases of the rough material question, which, I might say is a very complicated one, were threshed out in *in* some cases agreements were reached, and those were reflected in the tariffs.

After the decision of the Supreme Court of the United States there were conferences between the parties and all phases of the matter were gone over and an agreement reached to put in the reduced percentages and rates that are covered by the interstate tariff. The tariff which resulted from these conferences expressly carried a rate on rough heading and describes the percentages of heading out at thirty-five per cent of the weight of rough sawed heading; heading, twenty-one per cent of the weight of rough split heading; heading twenty-one per cent of the weight of bolts and logs; and on slack barrel staves or heading, twenty per cent of the weight of logs or bolts.

This was the tariff providing for the percentage of reshipment. The rough material matters during the injunction period have been handled by me. I have attended the meetings of the Commission from time to time and had this particular phase of the traffic in charge. At this time, September, 1914, the tariff in effect on rough material carries a specific rate on rough heading. There is other rough material besides rough heading that is carried in the rough material tariffs now that were not covered by Distance Tariff No. 3, namely, billet and blanks. If under Distance Tariff No. 3,
32 a shipper had asked us to bill out blanks or rough heading on the rough material rates and had inquired at my office whether such rates were applicable, I would have told him "No." There is a rate carried in Distance Tariff No. 3 on rough heading, the rate being named in Item 41, which specifically names staves, heading and hoops. This is what we call the flat rate and is the only rate quoted on heading in Distance Tariff No. 3. There is no merit in the contention that rough heading should be considered as rough lumber. Item 41 quotes the flat rates on heading, while an entirely different item, namely, Item 40, covers lumber and the various articles taking lumber rates and there is no provision whatever in Item 40 for heading. Item 41 is the only rate in Distance Tariff No. 3 pertaining to rough heading inbound. By comparison of the rates carried in Item 40 and 41 it will be seen that the rates on heading are considerably higher than the rates on lumber.

In construing tariffs, I would positively rule against the contention that the rough heading should be included under the rough lumber schedule. It would be *r*idiculous to so contend for there is a specific flat rate on staves and heading in Item 41. It is on a higher basis than the lumber rate. There is no mention made in

Item 40 of staves and heading for the reason that they are covered in Item 41. This was recognized by the Commission who constructed the tariff. The flat rate in Item 41 is applied on staves when there is no reshipment of the required percentage. The reason heading was not included in the early tariff is because the shipments of heading were small as compared to the other rough material shipments, and the flat rates on heading were very
33 low. This was the reason the shippers never made application to have the heading included in the rough material tariff prior to the time it was included. The movement of heading for the past several years has been on the increase. There have been a great number of hardwood plants located in Arkansas in recent years, and as they would locate and begin the shipment of product, in due course of time, they would make application for the adjustment of rates and the adjustment would be made to suit their business. If the rough material rates in Distance Tariff No. 3 were ever applied on rough heading, it was a misapplication of the tariff. Rough heading was first included in the rough material schedule in March, 1910. Item 79 provides what percentage of outbound shipments of heading is required to be manufactured for bolts but there is no percentage provided for outbound shipments of heading from inbound shipments of rough heading which demonstrates conclusively that the Commission did not intend or attempt to make a rough material rate on inbound rough heading. One reason for the rate on rough staves being higher that the rates on rough lumber is the fact that staves are of more value than lumber. In making shipments of rough material into the milling point the shippers furnish the carrier a description of commodity to be moved. The shippers prepare their own bills of lading and hand them to the agent for signature. As a rule, in car load shipments, the agent signs the bill of lading without ever seeing the contents of the car. The car is loaded and sealed by the shipper some distance from the station.

My understanding of rough heading is that it is a square block of wood. I do not know what dimensions. I have heard it described and have an impression about it, but to attempt to describe it
34 would be a pure guess. A flitch is a block cut from logs from which hoops are made. In getting this definition I took the matter up with various makers of hoops, and they told me one thing and another, and then I took it up with the dictionary and worked it out. I ascertained what a flitch was about a year and a half or two years ago. It was in the tariff long before I knew what it was. There are thousands of other terms in tariffs and classifications that I cannot define.

It is largely true that until the occasion arose for distinguishing between the several materials, billets and blanks inbound were treated as rough material by the railroads and shippers, and this was true to a large extent as to heading and finished heading. Before the Arkansas Railroad Commission fixed the rates the railroads fixed them and issued the tariff, and the railroads operated rough material rates in the state long before there was a railroad commission. I have before me a tariff issued by the railroad in

1907, and the rough material listed is the same as that shown in Tariff No. 3.

In Tariff No. 3 there was no express rate on either billets or blanks, so you would have to go to the western classification to get the rate. There is no flat rate on logs or ties in that tariff either. I do not find a flat rate on flitches. The rough material rate may have been applied on them, but if it was it was not authorized.

Question. Don't you know as a matter of history of the business that you are connected with that inbound rough heading and its manufactured product has always been treated as entitled to the rough material rates before this Distance Tariff No. 3 was put in?

Answer. If you will eliminate the word "always" and *and* say it may have been at times, I will agree with you. I can't swallow that word "always" there.

35 Question. Didn't your office treat rough heading in, before this Distance Tariff No. 3 was promulgated, and you had contracts with the shippers, didn't your office recognize rough heading shipped in as a proper subject on which to apply rough material rates?

Answer. I think there was a good many cases in which that was done. I don't dispute that.

Question. Didn't your office recognize it?

Answer. Maybe so. I can't dispute that. But you know I can't do all of the work of the office myself. There's several people there that handle it. And there's a possibility that they might have done that. But then it was a misapplication of the tariff, nevertheless.

Question. Was the point ever raised before?

Answer. The point was raised and we took care of it when it was called to our attention, and we specifically provided for it in the tariff.

Question. When was that?

Answer. The first time was February 6th, 1911, although I made a stagger at doing it back here in 1910. We made it on the title page of that issue, but we didn't provide the finishing touches for it.

Question. Until those tariffs specifically mentioned heading, as inbound rough material, didn't you know that it had been treated as such by both railroad men and shippers?

Answer. I might concur with you that there might have been numbers of cases where it was done; but I can't say that it was always done, as you put your question a while ago.

36 Question. Did you personally, or did your office, raise the point that it was not entitled to the rough material rate before this question of 1910 came up?

Answer. I couldn't answer that question. It might have been raised by me or my assistants; might have come from the accounting department; some agent out on the line may have raised it; or some traffic commission representing the shippers or some shipper himself. That is the reason I told Mr. McConnell I would be glad to look it up.

Question. So far as your recollection is concerned, when was the point first raised?

Answer. In answering that I am governed altogether by the tariff.

Question. And so far as you know it was not raised before that tariff affected it?

Answer. No, sir; because if it hadn't I would have dealt with it.

Question. And before that time, according to your recollection, rough heading was treated as legitimate rough material.

Answer. I think there was a number of cases where it was so applied by the railroad force; but I can't say that was always done. And if it had been presented to me for a ruling, I would have ruled against it.

Question. Well, what your ruling would have been would have depended on the particular tariff in force at the time, wouldn't it?

Answer. Yes, and when it was raised I would have taken measures to put it in.

Question. On the idea that it should have been in?

37 Answer. On the idea that it should have been in, taking in view the lumber situation down there, and knowing the situation that these men have to meet in competing for trade. I don't know any reason why I would not give it to them any more than I should give it to anyone else— and when I say me, I mean our company—for the purpose of assisting these industries and assisting ourselves at the same time. You know, if we had all the lumber on our road, it might be different, but we didn't. There's a number of industries on other roads and we have to watch the situation over there in dealing with those on our road.

O. V. DAVIDSON, testified in substance as follows:

I am traveling auditor for the claimant. My work is confined to the transit division, a branch of which work is the rough material matter. I have been so employed for two years and a half. I have had five years' experience in the auditing department. During that time it has been my business to familiarize myself with and construe tariffs and particularly with reference to the transit privileges which includes the rates on rough material now under consideration. I am quite familiar with Distance Tariff No. 3, particularly with the item pertaining to rough material. There is no rough material rate in that tariff on rough heading. Tariffs have subsequently been issued which do carry rough heading on the rough material basis. The railroad company's issues, beginning with March, 1910, have carried inbound rates on rough heading. I have examined the tariff at length and find that Item 41 is the only rate in the tariff on inbound shipments of rough heading.

38 (The rates provided in Item 41 of Distance Tariff No. 3 are higher than the rates actually charged and paid by the interveners on the shipments involved herein. Therefore, if it is held that Item 79 did not apply to heading, then interveners would have no claim against the complainant for refund on the rough heading shipments.)

I was not working for the railroad company when Distance Tariff No. 3 was issued and can only give you heresay evidence about what occurred then.

Question. Mr. Davidson, in the period that you were in the Auditor's office and connected with the Auditing Department, have you found that heading has been treated as rough material by the Auditor's office?

Answer. I will say that I didn't go into this work of rough material—never heard the term, I don't believe—until about February, 1912. At that time we covered rates on rough heading in our own issues, and nothing arose.

Question. You don't know what the custom of the Railroad was before that?

Answer. No, sir; I couldn't say.

J. A. Rhoads, testified in substance as follows:

I am in the accounting department of the complainant and have charge of the transit privilege division of that department. This includes rough material rates. I have been employed in the auditing department of the complainant for twenty years. My work has required me to familiarize myself with and interpret tariffs in a general way. I give the tariff special attention in reference to rough material matters. I have examined Distance Tariff No. 3 in
39 my investigations from time to time to ascertain whether or not it carried a rough material rate on rough heading and find that it does not. The only rates I find in No. 3 on rough heading are carried in Item 41. These were local rates, sometimes called flat rates.

Question. During the course of your service and experience in the general auditor's office, did you ever have occasion to know, either from what you saw or from what you understood from others there in the office, whether sawed and split heading was being handled altogether under the rough material rates, where the party was entitled to those rates?

Answer. No, I can't say I knew that.

Question. Did you have any information of the subject at all?

Answer. No, sir; as I explained before, we were not handling rough material matters until it was turned over to us in the early part of 1912.

Question. Then, except from what you have heard lately about this subject, I presume you don't know how that rough material was handled in the past?

Answer. I don't know how it was handled in the past, no, sir. Our checking of these accounts, of course, has taken us back into the period back as far as 1908.

Question. Now from what you have found, from what was shown back in 1908 and since that time, have you ascertained that heading was always given the rough material rate, where the party was entitled to the rough material rate?

Answer. We have found heading in there, at which rough material rates were assessed.

Question. Haven't you f-und that all of it was assessed,
40 that it was rated as rough material?

Answer. I don't know that all heading was assessed at rough material rates; but we have found heading in there, and I presume it was where client was working under a rough material contract.

Question. Did you find any exception to it?

Answer. No, sir; we didn't find any exception, because all we were looking for was rough material shipments. In making our check I think we took off most of the heading that went to parties entitled to rough material rates in the period since 1908. I did not notice in any instances where they were charged anything but rough material rates on heading. If there had been such an instance it would probably have attracted my attention, as we would have had to eliminate that car from our statement.

Question. Then the result of your check, so far as you know, was that all heading, sent to parties entitled to rough material rates, as a metter of custom went in there at rough material rates?

Answer. Well, about all we saw, I rather think, went in under rough material rates.

Question. Would there be any that you wouldn't see, that would be listed?

Answer. No, I hardly think there would, because we would have drawn off everything consigned to the party operating under a rough material contract; and in our check against the General Auditor's office records, if it developed that other than rough material rate had been assessed, we, of course, would have eliminated the item from our check. Our check indicates that there was heading inbound at rough material rates, and I do not recollect
41 any exception to it. If there had been an exception, I think I would have noticed it.

R. M. Warner testified in substance as follows:

I was chief rate clerk for J. G. Wallace, Special Master appointed by the United States District Court, for the Western Division of the Eastern District of Arkansas in this case and served the Master in that capacity while the claims for refund were being filed and considered by the Master. I have been in the rate business for twenty-five years, during which time I was station agent, commercial agent, and later general freight agent for the Missouri and North Arkansas Railway Company.

Rough material is covered in Distance Tariff No. 3 by Item 79. There is no rate named in that item on either rough, sawed or split heading. If I were tendered a shipment of heading, assuming that Distance Tariff No. 3 was in effect, and asked to apply the rate on it, I would not apply any rate named in Item 79 but would apply the rate named in Item 41. That would be the rate to apply. I worked for the Missouri and North Arkansas Railway Company from November, 1898, until January, 1914. Leslie, Arkansas, was a large rough material station. I went to Leslie as agent in November,

1909. We did not have any shipments of heading from Leslie until possibly 1910 or 1911, and at that time the tariff carried a rough material rate on heading. We had large shipments of staves before that time.

My present occupation is getting up some data from the Master's record in connection with some of the claims filed here. This is only a temporary appointment.

From 1898 to 1914 I was working for the Missouri and North
Arkansas Railway Company as station agent, commercial
42 agent and various other positions. I was station agent at
Leslie in 1909 and continued there until 1914. I was local
agent for the same road at Eureka Springs for a long time and I was general utility man in their auditor's office. In my railroad experience before I went to the Missouri and North Arkansas, I was not at any station where rough material was shipped. My first experience with heading was when that material began to move on that road in 1910 or 1911.

Interveners' Evidence.

W. C. HASTY, a witness introduced on behalf of Intervener, W. C. Hasty & Sons, testified in substance as follows:

Our company has been engaged in the cooperage business in Arkansas about twenty-five years and I have been connected with that company here for about twenty years. The plant is located at Paragould, Arkansas. We shipped into the plant rough heading and rough staves. At one plant we get in some heading bolts. We have one plant at Silt, Arkansas. We manufacture at that place sawed staves and sawed heading and buy some rough staves—rough split staves.

Question. What is made out of staves and heading bolts?

Answer. Well, you might say rough staves and rough heading. They are manufactured into circle finished staves or packages.

There has been a rough material rate such as is embodied in Distance Tariff No. 3 in force by the Iron Mountain Railroad in Arkansas for the last thirty-two years. During all my experience in
the stave business the practice between the railroad and ship-
43 pers has been, as far as I know, that sawed heading and split
heading, and sawed staves and split staves, should be consid-
ered under the operation of those rough material tariffs.

The tariff preceding Distance Tariff No. 3 carried rough material rates and sawed heading and staves moved under rough material rates. I have in my possession expense bills running back as far as 1904 covering heading and they show that it was handled under the rough material rate and attach a number of expense bills covering shipments for the years 1904, '5, '6, '7, and '8, covering shipments of heading. The rough material rate was applied on these shipments.

Witness here quoted definitions from the dictionaries of the word "Bolt" and also of "Staves."

The railroads began to make rough material rates about ten years ago.

Question. During all your experience in the stave business, the practice between the railroads and the shippers has been, as far as you know—have split heading and sawed heading, and sawed staves and split staves, been considered under the operation of those rough material tariffs?

Answer. Yes.

Question. Did you ever hear the point raised? When did you first hear the point raised that rough heading, or sawed heading, which is rough heading, as I understand it, was not within the tariff description of rough material rates?

Answer. When I got your letter our of the post office last Sunday night.

Question. In the settlements that your company has had with the Iron Mountain road, and the settlements that you know of with other concerns, has the point ever been raised that heading, sawed or split, was not entitled to the rough material rates?

44 Answer. It never was.

Question. It has been testified here that running back to the year 1904, at least, the Iron Mountain raod had tariffs out designating the same class of rough material that is shown in Distance Tariff No. 3, Item 79, issued by the Railroad Commission. During that period, when those tariffs contained the same designations as is shown in Distance Tariff No. 3, do you know whether the sawed heading and staves moved under those rough material rates?

Answer. Yes, sir. I have paid expense bills here for the years—some expense bills in the year 1904, 1905, 1906, 1907 and 1908, prior to the injunction, showing that heading was handled under the rough material rate. We have other expense bills running back through all these years similar to the ones I have before me, and the commodities similar, and they all moved under thr rough material rates. The railroad agents applied the rates to the shipments. I have before me both the Century and Webster Dictionaries, and quote the definition of "Bolt" and "Stave," as follows:

"(A). Bolt, in wood-working: A mass of wood from which anything may be cut or formed." Stave: In cooperage, one of the thin, narrow pieces of wood, grooved for the bottom, the head, etc., which compose a barrel, cask, tub or the like. (B). One of the boards joined laterally to form a hollow cylinder, a curb for a well or shaft, the curved bed for the intrados of an arch, etc."

Question. Under this definition of "bolt," in the Century Dictionary, would a sawed or split heading be a bolt?

Answer. It would, and would also include a sawed or split heading. From sawed or split heading the circular heading is cut.

45 Under the definition of "stave," given in the Century Dictionary, I think heading would be included. I do not know much about flitches. Never heard of that term until this case came up. My own definition of heading would be the same as that given in the dictionary.

A. R. Bragg testified in substance as follows:

I am traffic manager of the Merchants Freight Bureau which is an association of merchants formed for the purpose of observing railroad rates and assisting in getting proper adjustments of rates. I was in the traffic department of the St. Louis, Iron Mountain and Southern Railway Company twenty-five years, left them in February, 1904. I was then division freight agent at Little Rock when I left them. My division covered the entire State of Arkansas. I had occupied this position fifteen years. Before that I was their local freight agent.

In 1887 and 1888 my name appeared on the tariffs in which there was rough material rates. I think that was in 1887 or 1888; but afterwards the rough material rates were made in the general office. I had knowledge of the same, however, from my official position. While division freight agent I attended meetings of traffic managers and traffic men and traffic associations, where rate fixing was discussed. In discussing commodities as a group in the fixing of rates, no distinction was made between rough staves, stave bolts, rough heading, sawed heading and split heading. It was all considered rough material. So far as my knowledge goes sawed heading and split heading were considered raw material. I never heard the matter questioned until within the last week or ten days. It was
46 never questioned by railroad men or stave men but what
sawed and split heading were rough materials and entitled to the rough material rates. I speak of the information I have obtained from my experience while I was with the railroad company and subsequently while traffic manager of the Merchants Freight Bureau.

The items I have named as heading, staves, bolts, etc., were accepted by the railroads and understood by the shipper as rough material.

Question. It is obvious that they are rough material until they are finished. Is that not correct?

Answer. They would be useless without being finished.

Question. The fact that an articles is rough material doesn't necessarily mean that it is covered by the tariff which has the alternative provision, does it?

Answer. Oh, I think so; it is the custom.

Question: The fact that it is rough material puts it within that category?

Answer. I think it is, to be manufactured and reshipped.

Question. Suppose a lumber yeard in Little Rock is receiving a great amount of rough yellow pine lumber, and selling it locally on the yards at this point (Little Rock). They would still be entitled to the rough material rate?

Answer. I can't answer that question. I am not in the habit of quoting rough material rates. The members of my association would not ask me for the rate on rough material because they are familiar with those rates themselves.

Question. Under what heading in No. 3 do you contend that rough heading is covered?

Answer. Under the heading of rough material, in Item 79.

Question. What particular description is, in your opinion
47 given covering shipments of heading inbound?

Answer. I don't say, of course, that this tariff reads specifically "Heading." In looking for a rate on a commodity, I look to the tariff for the rate. In arriving at a rate in this instance, I would use an analogy.

H. J. WRAPE, Jr., of the Henry Wrape Company, testified in substance as follows:

I am the treasurer of the Henry Wrape Company and look after the management of its plants and mills in Arkansas. I have been directly connected with the operation of the mills in Arkansas for twenty-nine years. I am familiar with all of the features of the stave and heading business from the time the log is cut until it is finished. The finished products of our mills are finished staves and circular heading. Circular heading is finished ready to go into the barrel. My company has operated under the rough material rates ever since the rates have been in operation in Arkansas.

Question. In the operation of your business, state whether people connected with your business, and the railroad people with whom they have come in contact, have or have not treated split and sawed heading as properly within the rough material rates?

Answer. They have.

Question. Have those rates been applied to inbound rough material?

Answer. Yes, sir.

Question. On split and sawed heading?

Answer. Yes, sir. Well, we never handle any split head-
48 ing; it's all sawed or bolts. In billing commodities the railroad agents and others do not distinguish much between staves, heading, bolts, or staves and heading. We frequently see heading bolts simply marked heading; stave bolts marked staves. We do not pay particular attention to the billing.

Question. When was the first time that you ever heard that rough heading—I mean by that, sawed or split heading—was not included in the rough material rates?

Answer. In your letter of last week. I have got it here; I don't remember the date.

Question. That is the first you ever heard it questioned?

Answer. Yes, sir.

Question. You have been operating under those rates for a number of years?

Answer. Yes, sir.

Question. And in all your transactions with the railroad company, they never questioned but what these rough material rates included heading, sawed and split heading?

Answer. No, sir. All the heading shipped to us was in the rough. It was in the shape of bolts or sawed in the rough. Frequently heading bolts would come in billed merely heading. We have been re-

ceiving heading for the last twenty years. We have filed no claims with the Master on any sawed heading. It's all heading bolts, and we could have made either staves or heading from it.

Question. Who furnishes the description of the articles that move?

Answer. Why, the shipper.

Question. From whom you purchase the product?

Answer. Yes, sir. In some instances our employees go out
49 and ship the material into our plant, and, in such cases, they
sometimes make out their own bills of lading; sometimes they have the local freight agent make them out, probably they are in a hurry. They furnish the agent the description of the material and on that information he makes out the bill of lading.

The material shipped into our mill and on which shipments we are claiming a refund consisted of white oak and red oak staves and heading bolts; white oak and red oak, sawed heading, and staves and split white oak and red oak staves and gum logs.

J. F. KENNARD testified in substance as follows:

I am bookkeeper for the Mount Olive Stave Company and have held that position since July, 1908. I am perfectly familiar with the material that has been handled by that company and the way it has been handled. The expense bills from the railroad company would read bolts, sometimes staves, and sometimes heading. As a rule, if they were heading bolts, they would be billed heading. I should say a majority of the shipments came billed that way. All the rough heading or heading that the Mount Olive Stave Company has handled has been handled under rough material rates.

Question. When is the first time you heard it suggested that rough heading was not within the rough material rates?

Answer. On receipt of advice from you.

Question. After this litigation?

Answer. After this litigation was the first time I ever heard of it. That was just a few days ago.
50 I know Mr. Calef, General Freight agent of the Iron Mountain road. During the course of the year 1909, or in January, 1910, we were contemplating opening a plant near Hot Springs. As I recall the circumstances, we had some conversation, either with Mr. Jackson, who was then Assistant General Freight Agent of the Company, or Mr. Calef, probably with both, here at Little Rock. It was known to them we proposed establishing a plant at Hot Springs for the purpose of manufacturing rough staves, either buck or sawed, and probably rough heading, which was to be shipped on to Batesville for our finishing plant, for the purpose of being finished and put on the market. They informed us we would be entitled to the rough material rates on the products we were to handle.

I think the earliest shipments of heading received by us were received in June, 1910. I was not in the stave business before I went with the Mount Olive Company. I think our plant was established at Batesville in 1907. The plant near Hot Springs was established in the fall of 1909. The object of establishing the plant near Hot

Springs was to work staves and heading in the rough and ship them to Batesville for finishing. Later on we established a finishing plant at Hot Springs. We shipped a few cars of finished staves from that point but did not continue very long. The shipments from Hot Springs to Batesville were sawed heading. The first shipment of heading received at our Batesville plant was in June, 1910.

The foregoing statement of the case is approved this 30th day of August, 1919.

(Signed) JACOB TRIEBER,
Judge.

Endorsed: Filed August 30th, 1919. Sid B. Redding, Clerk, by W. P. Feild, Jr. D. C.

51 Which Assignment of Errors and Petition for Appeal is as follows:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

St. Louis, Iron Mountain and Southern Railway Company, Complainant,

vs.

George W. Bellamy et al., as Railroad Commission for the State of Arkansas, Defendants.

Considering themselves aggrieved by the final decision of the District Court on the intervention of J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry Wrape Company, in the above entitled cause, the plaintiff St. Louis, Iron Mountain and Southern Railway Company, and the United States Fidelity and Guaranty Company, the surety on the injunction bond filed in the original proceeding, each hereby prays an appeal from the decision and decree on said intervention in the above entitled cause to the Supreme Court of the United States, and the complainant and the United States Fidelity and Guaranty Company assign the following errors in the record and proceedings in the said cause:

1. The Court erred in overruling plaintiff's exception to the report of the Special Master, J. G. Wallace, numbered 12, and in finding and holding that "headings" were included in the rates on rough material described in Distance Tariff No. 3 prescribed by the defendants constituting the Railroad Commission of the State of Arkansas, and holding that the rates on rough material prescribed in said tariff applies to that commodity.

52 2. The Court erred in finding and holding that plaintiff collected from said interveners, J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry

Wrape Company, a higher rate for the transportation of "headings" than the rate prescribed on said commodity in Distance Tariff No. 3 promulgated by the Railroad Commission of the State of Arkansas.

3. The District Court erred in rendering judgment against plaintiff, St. Louis, Iron Mountain and Southern Railway Company, and the United States Fidelity and Guaranty Company as surety on the bond of said complainant on account of excessive rates alleged to have been charged and collected by complainant from said interveners for transportation of "headings" during the time the injunction was in force in said cause.

(Signed) JOHN M. MOORE,
GEO. A. McCONNELL,
Solicitors for Complainant, St. Louis, Iron Mountain & Southern Railway Company, and the United States Fidelity & Guaranty Company.

Appeal to the Supreme Court of the United States returnable in thirty days, granted, upon the execution of a bond in the sum of Five Hundred Dollars, conditioned as required by law, to be approved by the Clerk of this Court. August 30th, 1919.

(Signed) JACOB TRIEBER,
Judge.

Endorsed: Filed Aug. 30, 1919. Sid. B. Redding, Clerk. By W. P. Feild, Jr., D. C.

Which Bond for Appeal is as follows:

23 In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Complainant.

vs.

GEORGE W. BELLAMY et al., as Railroad Commission for the State of Arkansas, Defendants.

Bond on Appeal.

Know all men by these presents:

That we, St. Louis, Iron Mountain and Southern Railway Company and the United States Fidelity & Guaranty Company as principals, and E. J. Bodman, as surety, are held and firmly bound unto J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and the Henry Wrape Company, in the full and just sum of $500.00, to be paid to the said J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry Wrape Company, their successors or assigns, to which payment well and

truly to be made, we bind ourselves, or heirs, executors and successors, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of August, 1919.

Whereas, lately, at the April Term A. D. 1919, of this Court of the United States, for the Western Division of the Eastern District of Arkansas, in suits pending in said Court between the St. Louis, Iron Mountain and Southern Railway Company, and George W. Bellamy et al., as the Railroad Commission of Arkansas, a decree was rendered against the principals in this obligation. It has
54 obtained an appeal of the said Court to reverse the decree in the aforesaid suit and a citation directed to the said J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry Wrape Company, citing and admonishing them to be and appeal in the United States Supreme Court in the City of Washington, District of Columbia, thirty days from and after the date of said Citation.

Now the condition of the above obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs, if they fail to make good their plea, that this obligation shall be void; else to remain in full force and virtue.

(Signed) ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By GEO. A. McCONNELL,
Attorney. [SEAL.]

UNITED STATES FIDELITY & GUARANTY COMPANY,
By GEO. A. McCONNELL,
Attorney. [SEAL.]

E. J. BODMAN,
As Surety. [SEAL.]

Approved:
SID. B. REDDING,
Clerk.

Endorsed: Filed Aug. 30, 1919. Sid. B. Redding, Clerk. By W. P. Feild, Jr., D. C.

55 And on the same day the following proceedings were had, to-wit:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY et al.

vs.

GEORGE W. BELLAMY et al., as Railroad Commission for the State of Arkansas.

Come the complainants, St. Louis, Iron Mountain and Southern Railway Company and the United States Fidelity and Guaranty Company, by their attorney, Geo. A. McConnell and file herein their Citation with service of the same duly accepted by Rose, Hem-

ingway, Cantrell & Loughborough, Attorneys for the Interveners herein.

Which Citation is as follows:

56 The United States of America to Joseph F. Hasty, Eliphalet F. Hasty and William C. Hasty, composing the pertnership of J. F. Hasty & Sons; Mount Olive Stave Company, Pulaski Cooperage Company, and The Henry Wrape Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the City of Washington, D. C., thirty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the Western Division of the Eastern District of Arkansas, wherein St. Louis, Iron Mountain and Southern Railway Company and United States Fidelity and Guaranty Company are appellants, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, Judge of the District Court of the United States for the Eastern District of Arkansas, this 30th day of August, in the year of our Lord one thousand nine hundred and Nineteen.

JACOB TRIEBER,
United States District Judge for the Eastern District of Arkansas.

Service of above Citation accepted this 30th day of Aug., 1919.
J. F. LOUGHBOROUGH,
Attorney for Interveners.

Endorsed: Filed Aug. 30, 1919. Sid. B. Redding, Clerk.

57 Which Præcipe for the Transcript on appeal is as follows:

In the United States District Court for the Western Division of the Eastern District of Arkansas.

St. Louis, Iron Mountain and Southern Railway Company et al., Complainants,

vs.

George W. Bellamy et al., as Railroad Commission for the State of Arkansas.

To the Clerk of said Court:

On the appeal herein by complainant and United States Fidelity and Guaranty Company to the Supreme Court of the United States,

please incorporate in the transcript for the Supreme Court of the United States the statement of the case filed herein and approved by the Court.

(Signed) JOHN M. MOORE,
GEO. A. McCONNELL,
Solicitors for Complainants.

We acknowledge service of a copy of the foregoing præcipe and consent that the record of appeal shall be made us as therein indicated.

(Signed) J. F. LOUGHBOROUGH,
Solicitor for Interveners.

Endorsed: Filed Aug. 30, 1919. Sid. B. Redding Clerk, by W. P. Feild, Jr., D. C.

58 UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

I, Sid B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the original remaining of record in my office, at Little Rock, Arkansas, of the Statement of the case, Assignment of Errors, and of all proceedings, as called for by the præcipe for the transcript, in the case of St. Louis, Iron Mountain and Southern Railway Company, plaintiff, vs. George W. Bellamy, et al., as Railroad Commission for the State of Arkansas.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 23rd day of September, in the year of our Lord, One Thousand Nine Hundred and Nineteen, and of the Independence of the United States of America, the One Hundred and Forty-third.

[The Seal of the District Court, U. S. A., Western Division, of East Dist., Ark.]

Attest:

SID B. REDDING,
Clerk.

Endorsed on cover: File No. 27,308. E. Arkansas, D. C. U. S. Term No. 553. St. Louis, Iron Mountain & Southern Railway Company and United States Fidelity & Guaranty Company, Appellants, vs. J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry Wrape Company. Filed September 29th, 1919. File No. 27,308.

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67.—October Term, 1920.

Chicago, Milwaukee & St. Paul Railway Company and Wabash Railway Company, Petitioners, No. 66. *vs.* Des Moines Union Railway Company, F. M. Hubbell, et al. Des Moines Union Railway Company, F. M. Hubbell, et al., Petitioners, No. 67. *vs.* Chicago, Milwaukee & St. Paul Railway Company and Wabash Railway Company.	On Writs of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

[December 6, 1920.]

Mr. Justice Pitney delivered the opinion of the Court.

This was a suit in equity brought in the year 1907 in the Circuit (now District) Court of the United States for the Southern District of Iowa by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company against the Des Moines Union Railway Company. By an amended bill the individual defendants, Frederick M. Hubbell, Frederick C. Hubbell, and their firm of F. M. Hubbell & Son, were brought in; and afterwards the Wabash Railway Company, having succeeded to the rights of the Wabash Railroad Company, was substituted as a complainant in its stead. Jurisdiction depended entirely upon diverse citizenship of the parties.

Complainants own and operate lines of railroad extending to the City of Des Moines, Iowa, and connecting there with a joint terminal property, legal title to which is held by the defendant Des Moines Union Railway Company (hereinafter called for convenience the terminal company), in which complainants hold a minority

of stock, the Wabash Company an eighth, the other complainant a quarter, while the Messrs. Hubbell hold five eighths. Complainants assert that the terminal company holds its property in trust for their use, and that they are the sole beneficial owners, having an equitable tenancy in common, and being entitled to the joint use of the property in perpetuity, exclusive except as other railroads may be admitted to participate in such use with their consent. This is the principal matter in controversy. Intimately connected with it is the question of the validity as against complainants of the Messrs. Hubbell's claim to ownership of five eighths of the capital stock. A subordinate issue relates to the disposition of what are called "surplus earnings", acquired by the terminal company from outside parties during the operation of the terminal under an agreement made in the year 1889 between the terminal company and the predecessors of complainants and which expired in 1918.

Complainants base their principal contention upon a trust alleged to have been established under and pursuant to an agreement made January 2, 1882, between three companies then engaged in the construction of as many railroads converging at Des Moines, and through the incorporation of the terminal company in the year 1884 for the express purpose of acting as trustee for the three companies, and the conveyance to it by them of the terminal property, followed by the working agreement of 1889; from all of which it is contended that the terminal company has from the beginning held and still holds all its property subject to a trust under which the three railroad companies and their successors and assigns, and such other railroad companies having lines terminating at Des Moines as may be admitted with their consent, are entitled to have the terminal property maintained and operated for their use and benefit at the actual cost of the terminal service performed. Complainant Chicago, Milwaukee & St. Paul Railway Company is the remote successor of two of the three companies, owning what may be called the Northern and the Northwestern lines. Complainant Wabash Railway Company is the remote successor of the original company that owned the third, which may be called the St. Louis line. The bill of complaint prayed for a decree declaring and establishing the trust; an accounting for all income and profits received by the terminal company for switching or handling traffic at the terminal for companies other than complainants and their

predecessors, and for rentals of real estate and the like; and specifically and generally for other appropriate relief. The defenses set up in the answer and attempted to be supported by the proofs are, briefly, that by the deeds of conveyance made to the terminal company it took title not as trustee but absolutely and for its own sole use and benefit; that whatever relation may have arisen from the provisions of the original articles of incorporation, whether fiduciary or merely contractual, was substantially modified, and if fiduciary terminated, by amendments adopted April 8, 1890, alleged to have been thereafter recognized by complainants and their predecessors as valid and so treated by defendants and all others concerned; that complainants by their conduct and that of their predecessors are estopped from setting up the equitable title alleged, and have been guilty of laches barring relief in equity; hence that they are not entitled to assert any right or interest in the terminal property except such as arises from their ownership of a portion of the stock of the terminal company and from the provisions of the agreement of 1889; and that by the proper construction of that agreement the so-called surplus earnings are the property of the terminal company and not of complainants.

Upon final hearing the District Court made a decree from which both sides appealed to the Circuit Court of Appeals, where it was held (one judge dissenting) that the terminal company had complete and absolute title to the terminal property; that complainants, except as holders of its stock or bonds, had no interest in it, nor voice in the control or management; that by the true construction of the 1889 agreement complainants were entitled to the surplus earnings until May 1, 1918, and that thereafter the rights of the parties respecting the use of the terminal were only such as sprang from their nature as carriers and their physical and business relations to each other and to the terminal; by reason of which the terminal company must furnish them with reasonable terminal facilities at reasonable charges to be agreed upon, or in default of agreement to be fixed by the proper public tribunal. 254 Fed. Rep. 927.

Cross-writs of certiorari bring the resulting decree here for review.

The facts are intricate, and the evidence so voluminous that any detailed recital of it would be unduly tedious. It is sufficiently

referred to in the prevailing and dissenting opinions delivered in the Circuit Court of Appeals, and we will content ourselves with touching upon the salient points. The case involves no abstruse legal or equitable doctrine; the application of familiar principles to the facts as they are developed will direct us to the proper outcome.

The agreement of January 2, 1882, was made between the three railroad companies and two individuals in whose names certain titles had been taken for the benefit of the companies. Its principal provisions were that terminal facilities in Des Moines should be purchased, constructed, and maintained at the joint expense of the three companies and held and used in common; that the expense of acquisition should be borne one-half by the St. Louis Company, one-quarter by each of the others; "that a depot company may be organized and may take permanent charge of the property upon the terms herein set forth, and the said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements. [illegible] The title to said property shall be and remain in a trustee to be named by agreement of said companies, but subject to the joint use and occupation of all of said railway companies upon the terms herein described." The St. Louis Company was to be charged with police control, supervision, and maintenance of the terminal, and the expense thereof (including taxes) apportioned between it and the other companies according to the use they should respectively make as evidenced by the wheelage; spur tracks were to be built connecting the terminal with factories and other sources of trade in and about the city, but if either of the companies should deem the construction of any such track not advantageous the question of constructing it and which of the three companies should pay for it was to be determined by arbitration; any railroad company having a line not extending to Des Moines but having effected an arrangement for running its trains into the city over the line of either of the three companies was to be entitled to the use of the terminal facilities upon paying a fair sum for rental and a proportion of the maintenance account, the rental to inure to the three companies in the same proportion as the original outlay, and the sum due for maintenance to be determined in the same manner as in the case

of the three companies; railroad companies having lines extending into Des Moines might be admitted to the use of the terminal by agreement of all three companies; differences arising under the agreement were to be referred to arbitration.

The terminal company was organized by representatives of the three companies under articles of incorporation dated December 30, 1884, which recited the 1882 contract in full, with special emphasis upon the provision that a depot company might be organized to take permanent charge of the property, and declared that the new company was organized for this purpose as well as others that were expressed. The articles contained apt provisions to comply with the laws of the State of Iowa so as to enable it to construct, own, and operate a railway in, around, and about the city, with depots and everything else useful and convenient for the operation of railways at the terminal point, and with all the powers conferred upon corporations for pecuniary profit. Its corporate existence was to continue for fifty years, with the right of renewal. It was expressly declared: "All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." There was a provision that the written assent of the three companies should be necessary before the terminal company should lease or otherwise dispose of the use of any part of its franchises to any other railroad company. The capital stock was to be $1,000,000, divided into shares of $100 each, and paid in as the board of directors might determine, with authority to the board to receive in payment the property and franchises in Des Moines held by the three companies and their trustees. Four members of the board of directors were to be nominated by the St. Louis Company, two members by each of the other proprietary companies, and no stockholder to be eligible for membership in the board unless so nominated; this provision to apply to and be enjoyed by any grantee or assignee of either of the three companies. No contract, lease, or other agreement amounting to a permanent charge upon the property of the corporation to be entered into unless first approved by the three companies or their assigns and by more than three-fourths of all the stockholders.

January 1, 1885, each of the three companies held a stockholders' meeting, at which formal resolutions were adopted reciting the

contract of January 2, 1882, and the organization of the terminal company as contemplated in that contract and in order to carry out its purpose; each company thereby accepting and ratifying, so far as its interests were affected, the articles of incorporation of the terminal company as in substantial accord and compliance with the terms and conditions of the contract, and authorizing its officers to transfer to the new company all its right, title, and interest in the terminal property in exchange for a proper share of the bonds and stock of the terminal company.

On the same day the board of directors of the terminal company adopted resolutions accepting the transfer, management, and operation of the terminal property, appointing a committee to confer with the three railroad companies with respect to the terms and price at which the terminal property and franchises should be conveyed to it, and to procure from them "such conveyance and transfer as may be necessary to fully invest this company with the title, control and management of said properties provided for in said contract of January 2nd, 1882"; and authorizing the issue of all its capital stock and not exceeding $500,000 of bonds to be secured by mortgage of the properties so to be conveyed; the bonds and stock to be used in paying for the property, maintaining, operating, and improving it, and purchasing other property necessary to carry out the objects of the company.

Due apparently to the financial embarrassment of the original Wabash Company, which dominated the St. Louis and the Northwestern, terminal matters remained in abeyance until November, 1887, when deeds were authorized, and, between that time and the following April, were made by the companies and the individual trustees with the effect of vesting in the terminal company complete legal title to the properties that had been acquired for the purpose of establishing the terminal. The deeds were absolute in form. The terminal company by amendment of its articles increased its capital stock from $1,000,000 to $2,000,000, and authorized the making of a mortgage, which afterwards was given as of date November 1, 1887, to the Central Trust Company of New York as trustee, to secure an issue of $800,000 of 5 per cent. bonds for the purpose of paying for its property and completing improvements thereon; the mortgage covering all its real estate, rolling-stock, etc., then owned or thereafter to be acquired.

Until May 1, 1888, the terminal property continued to be operated by the St. Louis Company under the original agreement; on that date the terminal company took possession, and ever since then has continued to operate it and render terminal service thereon to the three railroad companies and their successors, as well as to other companies admitted from time to time under special agreements.

Upon a review of all the evidence, construing the writings in the light of the circumstances and the manifest purpose and intent of the parties, we are clear that the effect of the transactions thus far recounted was to establish a trust in the full and proper sense of the word, the terminal company being invested as trustee with complete legal title, but without beneficial ownership, and subject to a duty to maintain and operate the property and exercise all its corporate powers for the common use and benefit of the three railroad companies, their successors and assigns, and such other companies as might be admitted by them to a proprietary participation in the terminal.

The gist of defendants' argument to the contrary is that the incorporation of the terminal company and the conveyance of the property to it by deeds absolute in form manifested a substantial change of plan from that embodied in the contract of January 2, 1882; stress being laid upon the fact that the powers of a terminal railway company as acquired under the articles of incorporation were much more extensive than those of a depot company, and it being contended that the provisions of the articles respecting the control of the terminal company and the resolutions providing for the transfer of the property to it, the form of the deeds themselves, and the issuance of stock and bonds to the proprietary companies in payment, demonstrated a purpose to invest the terminal company with title for all purposes. But the main object of establishing a joint terminal at the common expense and for the common use of the three companies and to retain their proprietary interest in it while confiding its maintenance and operation to their trustee is so manifest that all the proceedings are properly to be construed as designed to give effect to it, and seeming inconsistencies and ambiguities resolved accordingly. The provision of the articles that "all the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract" is not merely contractual, but amounts to a declaration of trust

and together with the other evidence shows clearly that the powers were procured from the State expressly to enable the company the better to fulfill the purposes of its existence as such trustee, and not to set it up in business on its own account. The substitution of the terminal company with more elaborate powers in place of the depot company contemplated at the beginning shows a development and modification of the original plan, but no departure or substantial change. The particular stipulations contained in the articles respecting the control of the terminal company were intended not as a substitute for but as safeguards of the trust. The absolute form of the conveyances, and the issuance of stock and bonds "in payment", were intended to give credit to the company in its dealings with outside parties and to render its bonds more readily salable; but they constituted the mere mechanism for carrying into effect the main purpose of the parties, and as between them were controlled by that purpose and by the articles and resolutions that manifested an express declaration of the trust. All the circumstances, and what we have quoted from the resolution of the terminal company directors, show that the title was conveyed for the purpose of enabling that company to control and manage the terminal in furtherance of the objects of the 1882 agreement.

It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. *Colton* v. *Colton*, 127 U. S. 300, 310. But if, as here, the subject of the trust be a legal interest in property and capable of legal ~~transmission~~ the trust is not perfectly created unless the legal interest be actually vested in the trustee. *Adams* v. *Adams*, 21 Wall. 185, 192, 194. Hence the necessity in this case of deeds conveying the fee to the terminal company. But it is not necessary that the trust be expressed in the same instrument that transfers the title. Various instruments may be read together in order to ascertain the intention to establish one. *Loring* v. *Palmer*, 118 U. S. 321, 340.

The agreement of May 10, 1889, between the terminal company of the first part and the three proprietary companies of the second part fixed the terms upon which the property should be managed and the terminal service performed for a period of thirty years to date from May 1, 1888. It constituted a working arrangement

for that period, but did not in terms or by implication set aside the trust or place a time limit upon it. It provided that for the terminal service the proprietary companies should make payments, in proportion to the wheelage of each, to cover interest upon the mortgage bonds, the cost of maintenance, repairs, taxes, and insurance, and the cost of operating the terminal, including all expenses (except the operation of engine-houses, care of engines, and repairs thereto, which were separately dealt with), after deducting any amounts which other railway companies might be obliged to pay for the use of the property. Engine-house expenses were to be apportioned according to the number of engines of each company, engine repairs to be charged to the company for which the work was done. The agreement contained other provisions of permanent effect, providing for the allotment of the stock of the terminal company to the proprietary companies and declaring the terms upon which outside companies might be admitted to ownership of the stock or the use of the property. It recited that the proprietary companies were entitled to the stock in the proportion of one-half to the St. Louis Company, one-fourth to each of the others, and provided for the issuance of certificates accordingly, and that these should express upon their faces that they were not transferable without the consent in writing of all the proprietary companies, except as to shares issued to qualify directors. And there was a provision that the St. Louis Company might sell one-half of its stock, or one-quarter of the whole, to such railroad company as might be acceptable to a majority of the proprietary companies, in which case the purchasing company might be admitted as one of the parties to the agreement upon the same terms and conditions as those stipulated for the other parties of the second part; and that, except as thus provided, other railroad companies should not be admitted to the use of the terminal property without the consent of all the parties of the second part.

Here again we have a further modification of some of the details of the original plan, but in respects altogether consistent with the continuance of the trust; inconsistent, indeed, with a purpose to treat the terminal company as an independent entity subject only to contractual obligations and remit the proprietary companies to the ordinary rights of stockholders. Their contributions to the original cost of the property having been secured by mort-

gage bonds according to the plan of 1882, provision was now made for distributing the entire capital stock according to the original proportions, one-half to the St. Louis, one-quarter to each of the two other companies, but with certain material restrictions upon the ordinary rights of stockholders expressed in the agreement and others necessarily implied.

Since, from the very nature and terms of the trust, all the property and franchises of the terminal company were to be held for the benefit of the proprietary companies, and all its corporate powers exercised in the administration of the joint terminal for their common use, the stockholding interest in the terminal company necessarily must be modified, as between the parties, to the extent necessary to give full effect to the trust. In the hands of the proprietors of the connecting lines the stock was the evidence of their right to participate in the benefits of the trust, in the control and management of the terminal company, and in the use of the terminal; but such use, in the nature of things, must be proportioned, not according to the magnitude of their respective stock holdings, but according to their respective traffic requirements. And since the terms of the trust required that these connecting lines should have the entire beneficial use of the property upon paying the cost of the terminal service, there was no room for a profit from the operations of the terminal company out of which dividends could be paid. Except in the theoretically possible but extremely improbable event of an abandonment of the terminal (as to the effect of which no opinion need be expressed), it is plain that, as between the parties to the trust and others having notice of it, the stock could have little or no exchange value except to a company owning or operating a railroad line connecting or capable of connecting with the terminal. In the hands of others having notice of the trust, the stock represented no substantial property interest. Some recognition of the anomalous status of the stockholding interest is to be found in the acts of the parties above set forth, especially in the provisions of the agreement of 1889. The amount of stock provided for shows that it was deemed probable that eventually the property would have a value in excess of the original cost represented by the bond issue, or that value might be given to the stock through liquidation of the bonds or otherwise, and that upon a sale of a participation in the

terminal property and facilities to an outside railroad company, evidenced by a transfer of stock in the terminal company, some return could be got for such increased value. The apportionment of the original issue, and the stipulations of the 1889 agreement, recognized that the St. Louis Company, as representative of the original Wabash Company, was equitably entitled to preference in any profits that might be derived from such a sale to an outside company. And evidently it was then anticipated that there would be four proprietary companies, each holding one fourth of the stock, with equal representation in the board of directors.

We are not here concerned with any question pertaining to the rights of the bondholders. It may be assumed that, if necessary for their protection, the mortgage would be treated as conveying the entire estate, both legal and equitable, in the terminal property. No express provision appears to have been made for paying off the principal of the bonds. Whether the beneficiaries of the trust, as between themselves, were or are entitled to have provision made for discharging the principal by including periodic amortization charges as a part of the cost of operating the terminal is a question that we need not consider.

Nor are we at this moment concerned with any question that might arise if stock of the terminal company had come or should come to the hands of a *bona fide* purchaser for value without notice. The principal controversy arises from the fact that defendants F. M. Hubbell and F. C. Hubbell have become the holders of five eighths of the capital stock, upon which fact, together with the alleged effect of the amendments to the articles of incorporation adopted April 8, 1890, defendants rest the insistence that the proprietary companies have lost their right to control the action of the terminal company, that the Messrs. Hubbell as stockholders are entitled to control it and to have dividends out of its profits, and that from and after the expiration of the 1889 agreement, complainants have no right to the use of the terminal except upon terms to be agreed upon by the terminal company as controlled by the Messrs. Hubbell.

It is important, therefore, to consider the circumstances under which their stock was acquired and the amendments adopted.

Obviously the fiduciary character of the terminal company extended to its officers and directors as to all others concerned in its

management, charging them with a duty to uphold the trust and imposing upon them the usual disability about reaping a personal advantage at the expense of the beneficiaries. And it is clear and undisputed that the Messrs. Hubbell acquired their stock with full notice of all essential facts pertaining to the trust; they themselves at all times material were officers and directors of the terminal company and acted in a fiduciary capacity in everything relating to its affairs. Mr. F. M. Hubbell was an officer and director of that company at the beginning and continuously thereafter, especially active in its management; and during a period which included the important transactions in question he also was a director and officer of each of the proprietary companies and their trusted representative in respect to terminal matters at Des Moines. Mr. F. C. Hubbell became a director of the terminal company in January, 1890, president two years later, and has been such continuously since.

In the year 1886 and thereafter until and during the year 1890 the property of the Wabash system, including the stock of the St. Louis Company with control of its part of the stock of the terminal company, was in the hands of a purchasing committee as trustees for the Wabash bondholders. In February, 1890, F. M. Hubbell obtained from this committee an option for the purchase of \$135,000 of the terminal company bonds and a quarter interest in its capital stock for \$135,000, accepted the option, made over to General Dodge a half interest in it, and Hubbell and Dodge each received one-half of the specified bonds and one-eighth of the outstanding capital stock, with a guaranty on the part of the purchasing committee that the St. Louis Company would approve the transfer (as it afterwards did, through its board of directors), and that the committee would consent to such change in the articles of incorporation of the terminal company as would permit one director to be nominated by any person or company holding one-eighth of the stock. At this time General Dodge was president of the terminal company, and also president and principal stockholder of the Northern Company; Hubbell, besides his relation to the terminal company, was president of the Northwestern Company and its controlling stockholder. In correspondence between Mr. Hubbell and the purchasing committee antecedent to this transaction they warned him that it would be necessary to confine a sale

of stock "to such railway companies as would be interested in the station"; and he assented to this, acknowledging that "it would be prejudicial to sell any of this stock to outsiders, and I understand it as you do that the stock cannot be sold without the consent of the different railroad companies who now form the terminal company." Later Hubbell acquired from the purchasing committee $50.000 of the bonds and an additional eighth interest in the capital stock of the terminal company for $57,736, being par and accrued interest for the bonds and 15% of par for the stock, upon the understanding expressed in writing that an eighth interest should be "sufficient to represent a proprietorship in the company, according to the understanding we had when you were here"—evidently meaning that the eighth retained by the purchasing committee should carry with it a proprietary interest and influence in the terminal not limited in proportion to the amount of the stock.

Defendants insist that because the purchasing committee sold the stock to Hubbell and Dodge for a valuable consideration, they must be taken to have dealt with it as having substantial value; and that since, in afterwards making report to the board of directors of the Wabash Company, with an account of their financial transactions, the committee included their receipts from sales of the stock and bonds of the terminal company, and the directors approved the account, complainant Wabash Railway Company is estopped from denying that Hubbell and Dodge acquired a substantial and valuable interest in the terminal company. We deem it clear, however, that the intent of the purchasing committee, known and assented to by Hubbell and Dodge at the time, was merely to enable the latter to sell the three eighths interest to some railroad company capable of participating in the use of the terminal. Whether consistently with their fiduciary relations or not, they took advantage of this opportunity in the following year, when the Northern and Northwestern companies were consolidated and they sold to the consolidated company the stock in question, apparently and presumably at a profit over and above what they paid the purchasing committee for it. There is no foundation for the suggested estoppel.

The title now asserted by the Messrs. Hubbell to five eighths of the terminal company stock was derived not directly from the Wabash purchasing committee, but from the consolidated Northern

and Western company. That company, in addition to the three eighths transferred to it by Hubbell and Dodge, had the two quarter-interests originally owned by those companies, making seven eighths in all. In October, 1893, the consolidated company pledged to F. M. Hubbell & Son five eighths of the terminal company stock (2,500 shares) as security for a debt. The stock was transferred to the Hubbell firm on the books at that time, and so remained down to the institution of this suit, except as to five "qualifying shares" placed in the names of individuals but controlled by the firm. On January 29, 1894, the indebtedness was settled between the directors of the consolidated company and the Messrs. Hubbell upon terms that included a purchase by the latter of the 2,500 shares of terminal company stock at ten per centum of its par value. Passing for the moment certain special grounds of attack upon the title they thus acquired to these shares, it is obvious that they took them subject to all qualifications arising out of the trust that pertained to the property and franchises of the terminal company.

The quarter interest in the terminal company stock retained by the consolidated company afterwards passed from it to the complainant Chicago, Milwaukee & St. Paul Railway Company, which acquired at the same time the Northern and Northwestern lines. That company took with notice of the claim of the Hubbells to a five-eighths interest; but this does not estop it from disputing the validity of their claim, nor from setting up, as in this suit, whatever beneficial participation in the trust respecting the terminal property may be incident to its ownership of one fourth of the stock of the terminal company together with connecting lines of railroad, and asking for relief against any inequitable use by the Hubbells of the five-eighths interest claimed by them.

As to the amendments to the articles of incorporation: These are alleged to have been adopted at a meeting of the stockholders of the terminal company held April 8, 1890. Their purport was, briefly, to omit from the articles the copy of the contract of 1882 recited therein, the declaration that the powers exercised by the company should be in accordance with the terms and spirit of that contract, and the requirement that assent in writing of the proprietary companies should be necessary before any disposition of the franchises of the terminal company should be made; to set aside previous proceedings respecting the amount of capital

stock to be issued to the proprietary companies and provide for the distribution of a much decreased amount ($400,000 par instead of $2,000,000) but in the same proportions as before, the remaining capital stock ($1,600,000 par) to be issued only by resolution of the stockholders adopted by vote of more than seven-eighths of all the stock theretofore issued; and to eliminate the former method of selecting directors and provide that they should be elected by the stockholders, but that it should require the votes of more than seven-eighths of all the stock to elect a director, and that as to all matters except the ordinary operation of the property the directors could act only upon unanimous vote of the eight members of the board. One of the articles adopted purported to repeal, strike out, and expunge the proceedings of a stockholders' meeting held December 10, 1884, at which the original articles of incorporation were adopted.

It is plain enough, and is conceded, that the corporation could not, by merely altering its own internal organization, affect the interests of its *cestuis que trustent*. It is as evidence of a modification of the agreement between the stockholders of the terminal company—themselves beneficiaries of the trust—that the amendments are invoked. So regarding them, the question is, by what authority and with what intent were they adopted? The stockholders' meeting was attended by six individuals (including the two Hubbells), and two others by proxy, each of whom assumed to represent, and in a general sense did represent, one or the other of the three proprietary companies. F. M. Hubbell himself was president of the Northwestern Company and assumed to represent it. Others present were the vice-president of the Northern and the president of the St. Louis companies. The evidence fails to show that those present had express authority to act for the proprietary companies in amending the articles; and action of this kind—materially affecting the property interests of the three companies in a matter so vital as the ownership and control of an important terminal—was so far out of the usual or ordinary course of business that authority to represent their corporations in assenting to it was not to be implied as coming within the general scope of their duties. Nor did either of the proprietary companies, by any formal corporate action, accept or ratify the amendments.

Moreover, it affirmatively appears, and both courts below in effect found, that there was no actual intent on the part of any

of the parties concerned to affect the substantial rights or equities of the proprietary companies, or to terminate, repudiate, or substantially modify the trust respecting the terminal property. It does appear that some of those active in proposing the amendments, and assuming to act for the proprietary companies in assenting to them (there is a question whether they actually were adopted by a proper vote of the stockholders, but we do not go into this), were under the impression that the contract of 1882, recited in the articles of incorporation, already had been abrogated and the trust set aside by the issuance of the terminal company's bonds and apportionment of the stock to the proprietary companies in payment for the property conveyed and by the making of deeds absolute in form; that both in respect to the ownership of the property and the management of it under the contract of 1889 the original arrangement had been abandoned; and that it was desirable to amend the articles so as to make them conform to the situation actually existing.

Clearly, this was a mistaken impression, as will appear from what we have said. It was a mistake not indeed as to any mere matter of fact, nor on the other hand as to any pure question of law, but rather as to the existing legal rights, interests, and relations of the parties resulting from antecedent transactions. Whether it was such a mistake as to furnish ground for a cancellation of the amendments in equity, is a question into which we need not enter. (See *Snell* v. *Insurance Co.*, 98 U. S. 85, 90; *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Utermehle* v. *Norment*, 197 U. S. 40, 56; *Philippine Sugar Co.* v. *Philippine Islands*, 247 U. S. 385, 389; Pom. Eq. Jur., secs. 841-849.) For the fact that those who assumed to act for the proprietary companies in assenting to the amendments were mistaken as to the existing legal situation, so that the amendments, if given effect according to their terms, instead of bringing the articles into conformity with the situation already actually existing, would materially change the situation to the disadvantage of the proprietary companies by putting an end to an important trust contrary to their actual intent as parties beneficially interested, is a cogent reason for holding as we do that authority on the part of agents to assent to such amendments is not to be implied where it was out of the ordinary course of business and express authority was not conferred.

In support of the contention that the terminal property was not subject to any trust either before or after the amendments, defendants cite a series of contracts in which the terminal company asserted its ownership without qualification, and of conveyances, mortgages, etc., by the proprietary companies recognizing the legal title of the terminal company to its property and asserting in themselves only a title to shares in the terminal company. But when a trust is once established and acknowledged it does not need to be constantly reiterated or confessed. None of the instruments referred to is in anywise inconsistent with the trust; the contracts of the terminal company were made in the very course of its administration of the trust; and the mortgages and conveyances of the proprietary companies dealt with legal titles only, their equitable interests in the terminal passing without mention as incidental to their ownership of the stock together with the connecting lines.

The majority of the Circuit Court of Appeals held that the control of the proprietary companies was relinquished by reason of the amendments and the conduct of the parties at the time and thereafter, upon this theory: that although the amendments were neither previously authorized nor afterwards formally accepted or ratified by the three companies, yet since their executive officers were aware of and approved the action of the meeting; since Hubbell was encouraged to purchase the bonds and stock, the value of the stock being wholly prospective; since after the amendments the stock of the terminal company was issued in accordance therewith and directors elected by the new method, the railroads making no attempt to exercise their right of naming directors in certain proportions as before; since for 17 years the railroads acted, as it seemed to the court, in harmony with the amended articles, not questioning their validity until this suit was commenced; they could not, after such delay, enforce their rights in a court of equity against defendants who to their knowledge had acted upon the belief that such rights did not exist, and had acquired and held property which had largely increased in value in the interval. It was held that this result had come to pass although the railroads never had intended it; that the sale of a part of the Wabash stock by the purchasing committee to Hubbell and Dodge, then influential in the two other roads, would seem at the time a mere rearrange-

ment of the interests of the three companies in the terminal company; but that the effect of the amendments was a severance of the control of the roads over the terminal company, and subsequent events confirmed this, so that when the Hubbells disposed of their interests in the Northern and Northwestern to the Milwaukee, retaining for themselves a majority of the terminal holdings, the result was that the railroads themselves had gradually let slip that exclusive ownership and control which at the beginning they had so much valued and so carefully guarded.

Convinced that the relation of the parties was fiduciary and not merely contractual, we are unable to accept the view thus outlined. It would require a clear case to warrant a court of equity in declaring that the trustees of an express trust, in the very course of their administration of the trust, had acquired a dominant interest in the trust property and in effect a discharge of the trust, through mere inattention or even negligence—not raising an estoppel or amounting to laches—on the part of the parties beneficially interested, or of their executive officers. Conduct merely equivocal, or apparently inconsistent with a vigilant insistence upon the obligations of the trustee, is not sufficient to discharge a trust. The *cestui que trust* is entitled to rely upon the fidelity of the trustee, until plainly put on guard against him. And the trustee is at all times disabled from making a profit for himself out of any dealings in the trust property without the express consent of the *cestui que trust.*

Nothing appears to create an estoppel against complainants. Neither they nor their predecessors have misled defendants to their disadvantage. The purchasing committee accepted a money consideration from Hubbell and Dodge for the transfer of a block of stock. But the purchasers had more complete and intimate knowledge of the situation than the committee had, and were specially put on notice, as the correspondence shows. Indeed, their knowledge of the true nature and office of the terminal company constituted adequate notice. And again, when the Messrs. Hubbell reacquired the same three-eighths with an additional one-quarter interest from the consolidated Northern and Western Company, they were as before chargeable with full notice of all the facts out of which the equities of complainants arise.

The question of laches presents more difficulty; but after mature consideration we are convinced that it must be resolved in favor

of complainants. Acquiescence by the executive officers of the proprietary companies in the changed situation resulting from the amendments of April 8, 1890, is stressed by counsel for defendants, as it was in the majority opinion of the Circuit Court of Appeals; it being pointed out that after the amendments directors were elected in the new mode, and that in an agreement of ratification dated July 31, 1897, made for the purpose of giving recognition to the participation of the Wabash and of the consolidated Northern and Western Company in the obligations of the 1889 agreement, it was declared that so much of that agreement as related to the issuance and distribution of the capital stock of the terminal company was no longer binding, and the stock was held in specified proportions, including "F. M. Hubbell & Son 2,500 shares". This was a recognition of their status as *de facto* stockholders, but not a concession that the fiduciary character of the terminal company had been changed, or that the stock possessed any quality or value other than was consistent with the nature and terms of the trust. The parties acted in harmony with the amended articles so far as the internal organization of the company was concerned, but the company remained in possession of the property as before and continued to manage it in accordance with the terms of the agreement of 1889. Such possession was as consistent with a continued recognition of the trust as with the opposite; and it does not appear that at any time until shortly before the bill was filed defendants contended that the amendments amounted to an express repudiation of the trust or that the terminal company would be free from obligation at the expiration of the agreement. Prior to this there had been a difference about the disposition of the "surplus earnings," but this was no more than a question about the proper construction of the working agreement.

It seems to us the court below attributed undue weight to the conduct of the executive officers of the proprietary companies indicating acquiescence in a supposedly changed situation resulting from the amended articles. It would not be surprising if occasionally there was a failure to appreciate fully and accurately the rights and obligations growing out of the trust. But the Messrs. Hubbell, because of their fiduciary relation, are estopped from laying hold of the incautious, negligent or mistaken acts of the executive officers as a ground on which to build up a profit or

advantage for themselves at the expense of the proprietary roads which were their *cestuis que trustent.*

Upon the whole case, it is our conclusion that the trust with respect to the terminal property continues substantially as it was established at the incorporation of the terminal company; that this company holds all its property and franchises—whether conveyed to it at the beginning or acquired since—in trust for the purpose of carrying out, in substance, the terms and spirit of the contract of January 2, 1882, with such minor changes as have been agreed upon since, and is bound to exercise all its powers (including its power to renew the corporate charter) in furtherance of the trust; that the amendments of April 8, 1890, were unauthorized by the proprietary companies and had no effect in discharging or modifying the trust; that complainants are the sole beneficial owners of the property and franchises of the terminal company, and they and their successors and assigns, and such other railroad companies owning or operating lines of railroad extending to or near to Des Moines as may be admitted to a proprietary interest by consent of complainants and their successors and assigns, are (as between the present parties and their successors) entitled to the sole beneficial use of the terminal property upon paying the cost of the terminal service, including interest upon the mortgage debt and other proper charges, after crediting all revenues derived from other sources, and without profit to the terminal company; and that from and after the expiration of the 1889 agreement complainants were and are entitled to have a similar working arrangement renewed from time to time perpetually: its specific terms to be agreed upon between themselves, or judicially ascertained if they are unable to agree.

Complainants are entitled to a decree establishing the trust, with all appropriate incidental relief. We do not attempt to lay down the particular provisions of the decree. These may be settled by the District Court upon the going down of the mandate.

To consider, next, the status of the Hubbell stock: The title acquired by them from the consolidated company is attacked by the Chicago, Milwaukee & St. Paul on the ground that it was acquired by inequitable means, the Hubbells being at the time in control of the board of directors. It is attacked by the Wabash on the ground that the consolidated company could not in equity pass the stock to the Hubbells and thus impair the interest in

the terminal company then held by the St. Louis Company, to which the Wabash has succeeded. We have not found it necessary to consider whether these contentions ought to be sustained as independent grounds of substantive relief, or to what extent they would be affected by the agreement of July 31, 1897, in which the consolidated and the Wabash companies apparently gave recognition to the ownership of the stock by the Hubbells.

We pass this, because convinced that as incidental to the principal relief granted, and necessary to give full effect to it, complainants are entitled upon equitable terms to have the Hubbell shares (including all "qualifying shares" controlled by them) surrendered for cancellation. Our reasons, briefly, are as follows: The issuance of the stock to the Messrs. Hubbell, and the clause of the 1897 agreement relating to it, already have been considered with other evidence cited by defendants to show an assent to or acquiescence in a modification or abandonment of the trust, and are found insufficient for the purpose. Hence this stock, being like all other stock of the terminal company subordinate to the trust that dominates all its property and franchises, does not represent in the hands of the Hubbells any property interest that they are entitled to set up as against the proprietary companies. When they acquired it, and at all other times material, they themselves were and still are acting in a fiduciary relation to the trust; hence they cannot be heard to assert any right in the stock that is inconsistent with the trust. Manifestly it would be inequitable for them to sell it to a *bona fide* purchaser who might claim (even though unsuccessfully) to hold it exempt from the trust. They may have expected to sell it at a profit to one of the proprietary companies, or with their consent to an outside company or companies qualified to participate in the beneficial use of the terminal property under the trust. But, because of their fiduciary character, they are debarred in equity from trafficking in the trust property in this or any other way, without the express consent of the beneficiaries; they would be bound to account for any profit that might accrue; and any seeming consent on the part of the beneficiaries to waive such profit in advance, not amounting to a termination of the fiduciary relation, is in its nature revocable. The Hubbell stock, therefore, representing no legitimate proprietary interest as against complainants, serves merely

to evidence a voting power and to qualify its holders to act as directors and officers of the terminal company: in short, to participate in a fiduciary employment, without profit beyond compensation for the value of the services rendered. But complainants, being the sole present beneficiaries of the trust and equitable owners of the terminal property, are entitled in equity to a controlling voice in the choice of directors, and especially to have the management of the trustee company, now and hereafter, freed from the domination of a stock interest that represents no property-interest in the concerns of the trust. To guard against such alien control and at the same time prevent the danger of the Hubbell stock getting into the hands of *bona fide* holders who might set up rights under it which the present holders are debarred in equity from asserting—in short, to avoid undue jeopardy to the trust—complainants are entitled to have this stock surrendered, retired and canceled, and, until surrendered, to an injunction against any sale, assignment, or transfer of it or any part of it, and against the exercise of any voting power thereon; but upon terms that complainants shall repay to the Messrs. Hubbell the amount they paid to the consolidated Northern and Western Company for it, viz., $25,000, with interest thereon from January 29, 1894. How this should be apportioned, as between complainants, has not been discussed. It may be settled by the District Court.

The issue as to the surplus earnings relates to a considerable accumulation of moneys received by the terminal company from sources outside the proprietary companies. Possibly it may have become a moot question, in view of the result we have reached upon the main matter; but as this is not altogether clear we will dispose of the issue as raised. The agreement of 1889 provided that in making up the net cost of maintenance and operation chargeable to the proprietary lines on a wheelage basis, there should be deducted "the amount if any which other railway companies may be under obligation to pay by virtue of contracts for the use of said property or parts thereof." In the course of time, the terminal company received not only payments from outside railroad companies under contracts technically for participation in the use of the terminal property—which have been credited to complainants and their predecessors according to their wheel-

age—but, in addition, substantial sums from railroad companies and others for switching and other terminal services and for rent of portions of the property and privileges thereon. Receipts of the latter character were called "surplus earnings". For a period of nearly two years after the making of the 1889 agreement they were included in the credits given to the proprietary companies. This was done at first by the accounting officers of the terminal company under the general direction of its president and executive committee. In February, 1891, the practice was approved by action of the board of directors. About a year later the board resolved that until its further action sums received as rents of real estate and all switching charges should not be thus credited, but should be used as a cash capital "with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies." Thereafter the surplus revenues were not again credited to the proprietary companies.

We concur in the opinion of the Circuit Court of Appeals that by the fair construction of the 1889 agreement and the practical construction placed upon it by the parties at the beginning—a construction entirely consonant with the terms of the trust—complainants and their predecessors were entitled to credit for the surplus earnings as they accrued, each company to a share proportioned to its wheelage; and that the 1897 contract did not change this. It was decreed that these earnings belonged to complainants, and that there should be an accounting to ascertain the part due to each upon a wheelage basis. As to this the only question that occurs to us is whether the accounting should include sums that have been appropriated out of these earnings and devoted to capital expenditures for acquiring additional property and for permanent improvements—sometimes, apparently, with approval of complainants or their predecessors, sometimes without. This would hardly seem to be of serious consequence in view of the result we have reached upon the main issue. It is chiefly of interest to complainants; but they have not argued the question, declaring indeed that the entire controversy as to the surplus earnings would be material only should this court decide that complainants had no proprietary interest in the terminal company. Defendants have assigned error to so much of the decree of the Circuit Court of

Appeals as awards the surplus earnings to complainants, but have not furnished data enabling us to draw an accurate line between those that were and those that were not disbursed for permanent improvements, or between those disbursements that were approved and those that were not. Unaided by counsel we hardly could be expected to unravel the somewhat obscure evidence bearing upon these points. We must therefore content ourselves with simply affirming that portion of the decree which relates to the surplus profits.

The main portion of the decree as attacked by complainants must be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

As to costs, the decrees of the courts below apportioned them one-half to complainants and one-half to the terminal company. We leave this disposition undisturbed. The entire costs in this court should be paid by defendants Frederick M. Hubbell and Frederick C. Hubbell.

No. 66. Decree reversed.
No. 67. Decree affirmed.
Cause remanded to the District Court for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk Supreme Court, U. S.